TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. [redacted]64.

WILLIAM F. PROSSER, PLAINTIFF IN ERROR,

vs.

GEORGE L. FINN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED JULY 14, 1906.

(20,307.)

(20,307.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 342.

WILLIAM F. PROSSER, PLAINTIFF IN ERROR,

vs.

GEORGE L. FINN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

	Original.	Print.
Filing of record in supreme court of Washington	*a*	1
Transcript from superior court	1	1
Summons	1	1
Affidavit of service of summons	2	1
Complaint	3	2
Exhibit A—Affidavit of John A. Walker	8	4
B—Registry return receipt	10	6
Decision of register and receiver, Mar. 3, 1891	11	7
C—Decision of Commissioner, March 30, 1892	16	9
D—Decision of Secretary of Interior, July 7, 1893	20	11
E—Decision of Secretary of Interior, April 16, 1894	25	14
Demurrer to complaint	31	17
Order sustaining demurrer	32	18
Exceptions to order ruling on demurrer	33	18
Judgment	34	19
Notice of appeal and affidavit of service	35	19
Bond on appeal	37	20
Clerk's certificate	39	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 26, 1906.

	Original.	Print.
Opinion	40	22
Judgment	44	25
Petition for writ of error	45	25
Assignment of errors	46	26
Order allowing writ of error	49	28
Bond on writ of error	50	28
Writ of error	52	30
Citation	54	31
Acceptance of service of citation	55	31
Clerk's certificate	56	32

a 5903.

Sep. 28 Rec'd.

Filed Sep. 29, 1905.

C. S. REINHART, *Clerk.*

1 In the Superior Court of the State of Washington for Yakima County.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Summons.

To the said George L. Finn, Defendant:

In the name of the State of Washington, you are hereby summoned to appear, within twenty (20) days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled action in the Superior Court of the State of Washington, for Yakima County aforesaid, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorney for the plaintiff, at his office below stated and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the Clerk of said Court (a copy of which is herewith served upon you).

JAMES B. REAVIS,
Attorney for Plaintiff.

P. O. Address: 308–9 Oriental Block, Seattle, King County, State of Washington.

2 In the Superior Court of the State of Washington in and for Yakima County.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Affidavit of Service of Summons.

STATE OF WASHINGTON, *County of Yakima,* ss:

G. W. Wilgus being first duly sworn says: I am a citizen of the United States and a resident of said county, and not a party of said action, And that on the 3rd day of December, 1904, I served the within and attached Summons together with the annexed Complaint upon the said Defendant George L. Finn, by delivering to said de-

fendant then personally, true copies of said summons and complaint in said Yakima County, State of Washington.

G. W. WILGUS.

Subscribed and sworn to before me this 3rd day of December, 1904.

[NOTORIAL SEAL.] S. H. MASON,
Notary Public, Residing at Prosser, in Yakima County, State of Wash.

3 In the Superior Court of the State of Washington for Yakima County.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Complaint.

Now comes William F. Prosser, the above named plaintiff and complains of George L. Finn the above named defendant, and for cause of action alleges:

1.

That plaintiff is a native citizen of the United States and a resident and citizen of the state of Washington.

That on the 18th day of October, 1882, plaintiff made at the United States Land Office at North Yakima, Washington, in said Yakima County, Timber Culture entry 62, for Lots 1, 2, 5, 8 and 10 Sec. 2, T. 8 N. R. 24 E. Will. Mer.

That thereafter plaintiff duly planted trees and cultivated and improved in good faith said timber culture entry at great labor and expense and in all respects complied with the timber culture law.

That on August 30th 1888, one John B. Grandy, filed an affidavit of contest on the ground of non-compliance with the law, that thereafter contestant defaulted at the hearing and said contest was dismissed.

That thereafter and while plaintiff had so continued to plant trees and cultivate and improve said entry in good faith, and in compliance with the law, one John A. Walker filed an affidavit of contest against said entry, a copy of which affidavit is hereto annexed, and made a part hereof marked Exhibit "A."

4 That thereafter a hearing was had at said local land office and a decision rendered against the entry of plaintiff on the ground stated in the said affidavit of Walker, Exhibit "A," to-wit:

"Deponent further alleged that — the time the said William F. Prosser made said Timber Culture Entry No. 62 he was a United States Timber Inspector, and was then acting in that capacity and as such Inspector he was prohibited from making said entry and was not authorized and not consistent with the then existing laws."

That said decision was solely founded on a question of law, which was the incompetency of plaintiff to file for such entry for the reasons stated in Walker's affidavit therein set out.

Plaintiff avers that said decision of said local land office was and is erroneous, and it was contrary to the former decisions and constructions of the Department of the Interior, and disregarding all the equity and rights of plaintiff.

That said decision and the whole record thereof is hereto annexed and marked Exhibit "B" and made part thereof. That in said decision it was found as facts that plaintiff had in good faith complied with the Timber Culture Law and had at great expense attempted to grow trees and cultivate the same until the contest was made, and the entry cancelled by said decision.

2.

Plaintiff duly appealed from the decision of the local Land office to the Hon. Commissioner of the General Land Office, and said Commissioner of the General Land Office, on the 30th day of March, 1892, affirmed the said decision of the local office on the ground as signed in said local decision.

5 A copy of the decision of the Commissioner is hereto annexed marked Exhibit "C" and made part hereof.

That thereafter the plaintiff duly appealed from said decision of the Commissioner to the Hon Secretary of the Interior, and on the 7th day of July, 1893, the Hon. Secretary of the Interior reversed the said decision of the Commissioner, and the local land office at North Yakima, and dismissed the contest of Walker. A copy of which decision of the Hon. Secretary is herwith annexed and marked Exhibit "D" and made part hereof.

4.

That thereafter the said Contestant Walker, petitioned for a review of the decision dismissing the contest of said entry and on the 16th day of April, 1904, the Hon. Hoke Smith, Secretary of the Interior on review of the decision of the former Secretary reversed said decision, and affirmed the decision of the Commissioner of the General Land Office and the decision of the local land office. A copy of which said last decision is hereto attached and made a part hereof, and marked Exhibit "E," and plaintiff avers and shows that said last decision was erroneous in that it held against the former rules and decisions, and construction of the Land Department and against all the equities of plaintiff in said entry, and erred in the construction of the law governing said entry at the time it was made.

5.

The plaintiff resting on the construction of the law by the Interior Department at the time of the initiation of his said entry, and the special advice of the Hon. Commissioner of the General Land

6 Office, made his filing in good faith for said entry and pursuant thereto in good faith diligently planted trees, and cultivated said lands so described and at great expense in labor and

money, was capable and was intended to in all respects fully comply with the Timber Culture Law and perfect title to said lands.

That plaintiff long prior to the initiation of said contests ceased to be said special Agent of the General Land office and thereafter had no connection with the Land Department whatever, all of which was well known to the contestant.

That by said last decision of said Secretary of the Interior plaintiff's entry was cancelled erroneously and his remedy in the Interior Department closed and terminated.

That thereafter the said defendant in this cause was in pursuance of said erroneous decision permitted to enter said lands, he having full knowledge of plaintiff's rights and equities therein, and thereafter to-wit, on the — day of —— a patent was duly issued by the United States to him which patent is now on record in the Auditor's Office of said Yakima County.

That plaintiff has no other remedy for his grievances than in a court of equity. That in regard for the premises aforesaid and because of the erroneous decision of the Hon. Secretary of the Interior, plaintiff is in verity and equity the owner of said described lands, and in equity and good conscience should be declared the owner thereof and the said defendant should be decreed as holder of said patent, as the trustee for said plaintiff.

Plaintiff prays judgment that he be decreed the owner of said premises, and that said defendant be required as his trustee to convey the legal title evidenced by said patent to plaintiff; or in
7 default thereof a commissioner be appointed by this Honorable Court to make such conveyance, and for such other and further relief as to the Court seems meet and equitable.

JAS. B. REAVIS,
Attorney for Plaintiff.

8 EXHIBIT "A."

UNITED STATES LAND OFFICE AT
NORTH YAKIMA, *December 1st*, 1889.

Personally appeared before me Register of the Land Office at North Yakima, Yakima County Washington, John A. Walker of North Kakima, aforesaid who upon his oath says, that he is naturalized citizen of the United States; that he is well acquainted with the tract of land embraced in Timber Culture Entry, of William F. Prosser of North Yakima aforesaid, No. 62, made Oct. 18th, 1882, upon lots 1, 2, 5, 8 and 10 Section 2 Township 8 N. R. 24 E. W. M. containing 136 acres and knows the present condition of same; That on the 28th day of Oct. 1889 deponent filed an affidavit at the Land Office at North Yakima, aforesaid, upon which to contest the said Timber Culture Entry No. 62 of William F. Prosser, in which affidavit deponent alleges, "That William F. Prosser in 1885 has failed to plant; In 1886 he failed to plant, cultivate or protect trees; Nor did he — any respect comply with the law during 1887.

He failed to cultivate or protect the same during 1886, '87, '88, '89 and up to the present time. To the best of my knowledge there

never have been the amount of ten acres (10) planted; at the present time there is not over 500 hundred living trees; and the fences are broken down. The present appearance indicates abandonment and lack of *bona fide* intentions and compliance with the law."

Deponent now alleges in addition to the facts set forth in his said affidavit of Oct. 28th 1889 and which he makes a part of this affidavit and as an amendment to said affidavit; That 7 years have elapsed since the date of said entry, and that there are not growing 675 trees; on each acre of land, 15 trees, *15 trees*, are required by law to be planted, and to deponent's knowledge and belief there are not 675 living trees now on said land. That in '83, '84 and '85 no trees were planted in the Spring or Fall, but that some trees were planted in the Summer of these years which were not properly cultivated, all of which died, and no trees have been properly cultivated on said Timber Culture. Deponent further alleges that the time the said William F. Prosser made said Timber Culture Entry No. 62 he was a United States Timber Inspector, and was then acting in that capacity and as such Inspector he was prohibited from making said entry and the said entry was not authorized and not consistent with the then existing laws. That said tract is now settled upon and cultivated by said party as required by law, and this his contestant is ready to prove at such times and places as may be named by the Register and Receiver for a hearing in said case. And he therefore asks to be allowed to prove said allegations, and that the said Timber Culture Entry No. 62 may be declared cancelled and forfeited to the United States, he the said contestant paying the expenses of the hearing.

9

Sworn and Subscribed to this day and year above written before.

I. M. KRUTZ, *Register.*

STATE OF WASHINGTON, *County of Yakima, ss:*

Alvin L. Fix being duly sworn says, that he has read the foregoing affidavit of John A. Walter and knows the contents thereof. That he knows the condition of the land described therein and that the allegations contained in said affidavit are true.

10 EXHIBIT "B."

1891.

Registry Return Receipt Sent 3–4.

Reg. No. 264, from Post Office at North Yakima, Wash.

Reg. Letter / Reg. Parcel* } Addressed to J. B. REAVIS *North Yakima, Wash.*

After obtaining receipt below, the Postmaster will mail this card without cover and without postage, to address on the other side.

Received the above described registered { Letter. / Parcel.

(Sender's name on other side.)

J. B. REAVIS.

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

* Erase letter or parcel according to which is sent.

When registered letter or parcel accompanying this card is delivered, the Postmaster will require signature of the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $300 is fixed by law for using this card for other than official business.

Post Office Department.
Official Business.

Stamp here name of Post Office

Post Office at

North Yakima, Mar. 10, 1891, Wash.

and date of delivery.

Return to: —— Land Office.
Name of sender .....
Street and Number of Post Office Box.....
Post Office at North Yakima, Wash.
M. L.
County of ——, State of ——.

Notice of decision in contest case of Walker *vs.* Prosser and of forty days' right of appeal to Commissioner.

I. M. KRUTZ, *Register.*

[* Erased in copy.]

11 UNITED STATES LAND OFFICE,
NORTH YAKIMA, WASHINGTON, *March* 3, 1891.

JOHN A. WALKER
vs.
WILLIAM F. PROSSER.

Involving T. C. E. No. 62, Lots 1, 2, 5, 8 and 10 Sec. 2, T. 8 N., R. 24 E. Will. Mer.

Statement.

First. May 11, 1872, Dunn T. Tarbox filed pre. D. S. No. 244, (Walla Walla series), for Lots 1, 2, 5 and 6 Sec. 2, T. 8 N. R. 24 E., alleging settlement April 8, 1872.

Second. May 11, 1872, Essex K. Tarbox filed pre. D. S. No. 245, (Walla Walla series), for lots 7, 8, 10 and 11 Sec. 2, T. 8 N. R. 24 E., alleging settlement April 8, 1872.

Third. August 13, 1881, Edward Bruyn made T. C. E. No. 30 (Yakima Series), for Lots 1, 2, 5, 8 and 10, Sec. 2, T. 8 N., R. 24 E. The entry was cancelled upon relinquishment October 18, 1882.

Fourth. October 18, 1882, William F. Prosser made T. C. E. No. 62, for Lots 1, 2, 5, 8 and 10, Sec. 2, T. 8 N., R. 24 E. August 30, 1888, John B. Grandy filed affidavit of contest against the entry. The docket entry is "Time set October 23, 1888; no deposit; personal service; (G Sheriff $1.50 paid). Parties appeared and hearing continued on affidavit of contestee to December 27, 1888. December 27, 1888, contestant defaulted. All parties notified. Case dismissed—sent to Commissioner March 9, 1889."

12 Fifth. October 28, 1889, John A. Walker filed affidavit of Contest against the entry and on December 9, 1899, filed supplemental affidavit. Notices issued December 10, 1889, for personal service. Date set for hearing February 5, 1890, at 10 o'clock a. m. Evidence of service filed December 11, 1889, February 5, 1890, parties appeared and upon motion of contestee case was continued until 10 o'clock a. m. February 6, 1890. On last named date the contestant appeared in person and by his counsel, J. B. Reavis; counsel for contestant filed authority for his appearance. February 15, 1890, contestee was granted permission to file interrogatories to take the deposition of one Ara A. VanAntwerp, Puyallup, Washington; contestant filed cross-interrogatories; commission issued same date to B. S. Jacobs, notary Public at said town to take the deposition at his office on February 19, 1890. The deposition was filed in this office February 21, 1890; contestant files his brief June 10, 1890, and on August 8, 1890, files a protest against being required to pay the sum of $5.60, for taking of said depositions. August 21, 1890, contestee filed certified copy of Commissioner's letter "G" of July 22, 1882, and on October 17, 1890, contestee filed his reply to contestant's brief.

Decision.

October 28, 1889, John A. Walker filed affidavit of contest *vs.* William F. Prosser, involving timber culture entry No. 62, made October 18, 1882, for lots 1, 2, 5, 8 and 10, Sec. 2 T. 8 N., R. 24 E. W. M., alleging non-compliance with the timber culture law.

13 A supplemental affidavit was filed December 9, 1889, charging that contestee at the time of making this entry was a Special Agent of the General Land Office and was disqualified thereby from acquiring title to government lands.

In response to notice of hearing the parties appeared in person and by counsel and submitted testimony upon the issues joined.

The record is voluminous, considerable testimony being directed to the amount and character of work performed by claimant in his endeavor to comply with the timber culture law. The first question to be determined is whether or not the entryman was prohibited by an act of congress from securing title the question of compliance with the law governing the entry.

It appears from the testimony a*b*duc*t*ed at the hearing that Mr. Prosser was appointed Special Agent of the General Land Office, July 26, 1880, and was performing the duties as such agent at the time of initiating the entry. He was charged with the duty of caring for and protecting the interests of the government in the disposal of its public lands.

His duties afforded an opportunity of gaining information of the public domain not extended to the ordinary settler. As a result of this superior advantage he selected a very desirable tract bordering upon the Yakima River at a point where there are falls well adapted to the production of power for running machinery etc., which rendered the land more valuable than ordinary agricultural tracts.

Bad faith cannot in any wise be imputed to the entryman for it appears that he has expended considerable time and money attempting to grow timber on the land but with meager results.

14 It is situated in a dry, arid section of country where little or no vegitation will grow without irrigation. The repeated efforts to grow trees evince good faith in an honest endeavor to faithfully comply with the law.

Counsel for contestee urges in his brief that inasmuch as his client was permitted to acquire title to the S. E. ¼ Sec. 6, T. 35 N., R. 4 E., D. S. No. 5008, filed July 17, alleging Settlement July 12, 1880, at a time when he was a public officer this entry should be upheld. This contention is not tenable for the reason that the time the declaratory statement was filed he had not received his appointment as Special Agent. The Letter from the Commissioner ("G" July 22, 1882), directs the local officers of Olympia, Washington to allow Mr. Prosser to make payment for the land and upholds the doctrine that a Special Agent does not come within the inhibition contained in Section 452, U. S. Revised Statutes.

The entryman should have been permitted to make payment for the land because at the time of making his filing and settlement upon the land he was not a Special Agent of the General Land Office, nor in any way disqualified from obtaining title to government lands. We are enclined to the opinion that the Commissioner erred in stating that a Special Agent does not come within the prohibition of the Statute prohibiting employees of the land department from entering lands within the public domain. Of all the officers and employees connected with the General Land Office, Special Agents, from their peculiar duties, have the best opportunities for gaining information of lands and we consider it a wise policy to exclude such officers from the privilege of entering lands.

A great hardship has been done the contestee in this case because we have no doubt he was led to make this entry upon the authority of the letter before referred to; but holding to the doctrine that Special Agents come within the inhibition of Sec. 452 of the Revised Statutes, we are unable to afford him the relief we would desire to give.

We therefore hold that said timber culture entry was void in its inception and recommend its cancellation. Forty days are given in which to take an appeal to the Commissioner of the General Land Office.

I. M. KRUTZ, *Register.*

I concur.

J. M. NANCE, *Receiver.*

WASHINGTON, D. C., *March* 30, 1892.

JOHN A. WALKER
vs.
WILLIAM F. PROSSER.

Involving Prosser's Timber Culture Entry No. 62, upon Lots 1, 2*1* 5, 8, and 10, Sec. 2, Tp. 8 N., R. 24 E.

Register and Receiver, North Yakima, Washington.

GENTLEMEN: The above entitled cause is before me on appeal by defendant, duly filed and served, from your decision; adverse to him.

Defendant made his entry October 18, 1882.

Plaintiff filed his affidavit of contest October 28, 1889, alleging failure of defendant to comply with legal requirements, and on December 9, 1889, filed supplemental affidavit charging the illegality of the entry on the ground that when defendant was a Special Agent of the General Land Office and therefore disqualified from acquiring title to Government lands.

After due notice, both parties appeared at the hearing held from February 5 to 24, 1890, and submitted testimony upon the two issues raised by said affidavits.

You found for the plaintiff, upon the issues presented by his supplemental affidavit, and such action appears to have been based

upon the present ruling of this office, which is — the effect that by section 452, Revised Statutes, a special agent of the General Land Office is inhibited from making a timber culture entry.

Defendant claims that, inasmuch as his said entry was made on the strength of office letter (C) to the local officers at
17 Olympia, W. T., dated July 22, 1889 (a certified copy of which, from the records of this office, accompanies the record), the office should not now hold the same for cancellation. It was stated in said letter "C" that Wm. F. Prosser, the present defendant, then a special agent of this office, was entitled to enter the S. E. ¼ 6-35-4 East, under his D. S. 5008, and this because "the Circular of August 23, 1876, issued by this office under Hon. Secretary's decision of August 3, 1876 (Copy L. C., 122), forbids the entry of public lands by clerks and employees in the local land office, but does not apply to special agents."

An examination of said office Circular of August 23, 1876, fails to show that the construction placed upon it by letter "C" was authorized. It merely stated "that registers and receivers and their clerks, employés and those intimately and confidentially related to the register*d* and receivers, their Clerks and employés, will not be permitted under any circumstances, to make any entries of the public lands in the district offices over which they are respectively employed, and that upon satisfactory proof that this regulation had been violated the officer offending will be reported for executive removal."

Nothing herein is stated relative to special agents. The circular is merely silent upon that point, and I know of no case wherein the department has recognized the right of, or allowed, a special agent to make an entry while he was acting in such capacity.

In fact, in the case of Herbert McMicken *et al.* (10 L. D., 97) the Department discussed the question without any reference to the Circulars issued by this office and held: "That the disqualification to enter public lands co*m*tained in section 452, R. S., extends to
18 officers and employés of any branch of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of public lands." The case then under consideration by the department was one involving entries made by employés in the office of the Surveyor-General of Washington Territory, and the entries were cancelled because made by the parties so employed, notwithstanding the fact that such entries were initiated (February 14, 1883) at a date prior to the issuance of office circular of August 23, 1883 (2 L. D., 313) holding that a special agent of the General Land Offices is inhibited by section 452, Revised Statutes, from making a timber culture entry. And upon review of the McMicken case (11 L. D., 96) it was further stated by the department that the language used in section 452, R. S., did not even admit of a "doubtful construction." The language of said section is "That the officers, clerks and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interest- in the purchase of any of the public lands and any person violating this section shall forthwith be removed from his office.

While I therefore believe that the defendant made his said entry upon the strength of the ruling made by said letter "C," as claimed by him, yet, in view of the fact that the language of the law itself is plain, and that the Department does not appear to have ever placed a construction upon the section different from that which now obtains, I feel constrained to affirm your decision and hold said entry for cancellation on the ground of illegality.

A discussion of the other issue—that raised by plaintiff's original affidavit—is therefore unnecessary.

19 Duly advise the parties of this decision and defendant of his right of appeal therefrom.

Very respectfully, WM. STONE,
Assistant Commissioner.

20 EXHIBIT "D."

17—682 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July* 7, 1893.

JOHN A. WALKER
vs.
WILLIAM F. PROSSER.

Timber Culture Entry.

The Commissioner of the General Land Office.

SIR: I have considered the case of John A. Walker *v.* William F. Prosser, on appeal by the latter from your decision of March 30, 1892, holding for cancellation his timber culture entry for lots 1, 2, 5, 8 and 10, Sec. 2 T. 8 N., R. 24 E., North Yakima, Washington, land district.

The record shows that on October 18, 1882, Prosser made Timber culture entry for the land in controversy, and on October 28, 1889, Walker filed affidavit of contest against the same.

The affidavit was amended, and as such it alleged that the entryman was disqualified to make timber culture entry, because at the time of making it he was a special agent of the Government, appointed by the Commissioner of the General Land Office; secondly, that he has failed to plant and cultivate trees on said tracts. A hearing was duly had upon the charges made, and the local officers held that as he was such special agent, the entry was void in its inception, and recommended its cancellation. From this decision the entryman appealed, and you upon considering the case, affirmed said action, and held the entry for cancellation, from which decision he also appealed.

This case is peculiar. As the local officers say, "A great hardship has been done the contestee in this case, because, we have
21 no doubt, he was allowed to make his entry upon the authority of the letter before referred to." The letter "referred to" was

a letter by Commissioner McFarland to the Register and Receiver at Olympia, Washington Territory, dated July 22, 1882.

This entryman had made final proof on another tract of land, on which he had a pre-emption filing, and being a special agent of the general land office in the district in which the land was situated, the local officers declined to accept the proof, but transmitted the same to the general land office, asking for instructions. The letter referred to contained, *inter alia,* the following rulings.

It is held by this office that the case of Mr. Prosser does not come within the inhibition contained in Section 452. Revised Statutes, and that a special timber agent may be entitled to the pre-emption privilege, not being employed in the general land office at Washington. The Circular of August 23, 1876, issued by this office, under the Hon. Secretary's decision of August 3, 1876, (3 Copps Land Owner, 122), forbids the entry of public land by clerks and employés in the local land offices, but does not apply to special agents.

Under this ruling, he made the timber culture entry now before me, on October 18, 1882.

In 1883, the case of Grandy *v.* Bedell came before Secretary Teller (2 L. D., 314). Bedell had made a timber culture entry while he was a receiver's clerk in the land office in which the tract was situated. He had ceased to be such clerk when the contest against the entry was initiated, after quoting the Statute Section 452, R. S.), and referring to the circular extending the operation of the statute to include the clerks in the local offices, and referring also to the
22 case of State of Nebraska *v.* Dorrington (2 C. L. L., 1882, 657), the Secretary says:

But in the case now under consideration, the entry was allowed November 8, 1875, and since that time the claimant has apparently in good faith observed the requirements of the timber culture law, so far as within his power. At the time of the contest the claimant was not an employé of the district office. Taking these facts into consideration, and the further one that he was not by express provision of law incompetent to make the entry, I am of the opinion that it should be permitted to stand. Under the existing regulations of your office the entry should not have been allowed in the first instance, but inasmuch as it was, to insist upon its cancellation after so many years compliance with the law, would seem to be giving undue importance to the rule forbidding such entry.

In the case at bar it is evident that the entryman did not intend to defraud the government, as inquiry was duly made of the Commissioner of the General Land Office, and the facts were laid before him. Besides this, the entryman has not been in the Government employ as such special agent since 1885, and like Bedell, in the case cited, he was not in the Government employ when the contest was commenced. If he was inhibited at the time the entry was made, the disability was removed before the contest was initiated, or any adverse right attached.

An entry or filing made by a minor is invalid, but if the disability of infancy is removed before an adverse claim attaches or a contest

is initiated, the invalidity is cured. James F. Bright (6 L. D., 602).

So when an alien makes a filing before declaring his intention to become a citizen, it is invalid, but declaring his intention before any contest is initiated, or adverse claim attaches, it relates back to the date of filing, and cures the defect. (Lord *v.* Perrin 8 L. D., 536).

The evidence shows that the local officers were substantially correct in saying "Bad faith cannot in anywise be imputed to the entry man, for it appears that he has expended considerable time
23 and money attempting to grow timber upon the land, but with meager results."

There is another matter that enters into the consideration of this case. It was of record that the entryman was a special agent, and it was notorious in the community in which the land is situated that he was serving in that capacity. I will not say that an ex-toppel can be pleaded in the case, but I will say that the contestant's claim is entitled to less consideration than it would have been had he asserted it immediately upon the entry being made, instead of standing by until the entryman has fenced a large tract of the land, and broken and cultivated 20 or 30 acres, and planted and replanted trees, and until, by his (plaintiff's) own statements, a canal is being constructed which will enable the entryman to irrigate his tree claim, and which renders the land of double or treble the value it was when the entryman began work upon it.

Having considered the case in the light of all the facts, and especially the fact that the entryman had the direct ruling of your predecessor, that he did not come within the inhibition of Sec. 452, R. S., which at the time of making his entry, was to him the law, I cannot concur in your rulings.

There seems, indeed, to be no clear sweeping ruling upon the question until February 3, 1890, in the case of Herbert McMicken, *et al.* (10 L. D. 97), this being long after the entry, and long after the entryman had ceased to be in the Government employ.

I agree with the local officers that there was error in the ruling, that a special agent does not, under the present rulings, come within the inhibition of the statute, but such as I have said, was not
24 the ruling of the Commissioner when direct inquiry was made of him in this entryman's case, at the time the entry was being made. This peculiar feature of the case, and the hardship it would work to deprive the entryman of his improvements, made in good faith, and turn them over to one who has stood by all the years of the entry and seen them being made, compels me to follow the decision of Secretary Teller, in Grandy *v.* Bedell, *supra*. The contest is therefore dismissed, your decision accordingly reversed, and the entry will remain intact.

The papers accompanying your letter "H," of August 23, 1892, are herewith returned.

Very respectfully,

WM. H. SIMS,
First Assistant Secretary.

10343.
13461–1893.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April* 16, 1894.

JOHN A. WALKER
v.
WILLIAM F. PROSSER.

On Review.

To the Commissioner of the General Land Office.

SIR: By your letter of September 6, 1893, you transmitted a motion for review upon the part of the contestant in the case of Walker *v.* Prosser, decided by this department July 7, 1893, and reported in 17 L. D., page 85.

October 18, 1882, William F. Prosser made timber-culture entry for lots 1, 2, 5, 8 and 10, Sec. 2, T. 8 N., R. 24 E. North Yakima land district, Washington.

October 28, 1889, John A. Walker filed an affidavit of contest alleging *inter alia* that Prosser was disqualified to make timber culture entry, because at the time he made it he was a special agent of the Government, appointed by the Commissioner of the General Land Office.

The register and receiver recommended the cancellation of the entry on the ground of disqualification. Upon appeal to your office the decision below was sustained and upon further appeal, the departmental decision before referred to reversed and conclusions heretofore reached and dismissed the contest and allowed the entry to remain intact.

The motion for review raises two questions: the qualification of the entryman and the alleged non-compliance with the timber-culture law. In view of the conclusions herein reached
26 upon the first exception, it will be unnecessary to consider the second.

Section 452 of the Revised Statutes provides that the officers, clerks and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interest- in the purchase of any of the public land: and any person who violates this section shall forthwith be removed from his office.

This first legislation upon this subject was that of April 25, 1812, 2 Stat., page 717, and this was followed by the act of July 4, 1836, 5 stat., page 107, out of which the section grew that is quoted above.

The language used in the statute is plain, and unambiguous and the disqualification is absolute and this department has heretofore so construed it.

In the case of the State of Nebraska *v.* Dorrington *et al.*, (13 Copp's Land Owner, 122), Secretary Chandler held that:—

Registers and receivers and their clerks and employés and all persons intimately or confidentially connected with such officers or employés, are prohibited from making entries of the public lands at the office at which they are connected.

August 25, 1876, a circular was addressed to the registers and receivers by the Commissioner of the General Land Office as follows:

Pursuant to instructions from the Hon. Secretary of the Interior, of the 3rd inst., you are hereby advised that the Registers and Receivers, and their clerks and employés, and those intimately and confidentially related to the registers and receivers, their clerks and employés, will not be permitted, under any circumstances, to make entries of public lands at the district offices over which they respectively have control, or in which they are respectively employed; and that upon satisfactory proof that this regulation has been violated, the officer offending will be reported to the Executive for removal.

This regulation is not intended to apply to cases provided for in section 2278 of the Revised Statutes of the United States, where parties initiate claims under the preemption or homestead laws and are subsequently appointed Registers and Receivers.

27 In Grandy *v.* Bedell (2 L. D., 314), the syllabus is—

As the evidence fails to show a substantial compliance with the timber culture law, in view of the unfavorable weather, the entry is allowed to stand, notwithstanding the party was a clerk in the local land office at date of making entry.

This decision is contrary to the one just before cited and is without the support of prior or subsequent holdings up to the rendering of the one in the case last at bar which is now sought to have reviewed.

The case, (*supra*) has never specifically been set aside and overruled, but in the case of Herbert McMicken *et al.* (10 L. D., 97, Secretary Noble held that the disqualifications to enter public lands contained in section 452 R. S., extends to officers, clerks and employés in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of public lands.

A timber land entry made by an employé in the office of the surveyor-general of the district in which the land is situated is illegal and must be cancelled.

Subsequently on a motion for review of the case it was held (11 L. D., page 96), that,

Clerks in the office of the surveyor-general are clerks and employés in the office of the Commissioner of the General Land Office, in contemplation of law, and therefore under the inhibition of section 452 of the Revised Statutes, disqualified to enter public land—

Directions given for the formulation of a circular in accordance with the construction of law herein.

On September 15, 1890, the circular referred to was issued and was as follows (11 L. D., 348):

Section 452 of the Revised Statutes provides that—'the officers, clerks and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall be forthwith removed from his office,' the Hon. Secretary of the Interior, in the case of Herbert McMicken *et al.*, (10

L. D., 97; 11 L. D., 96), has decided that the disqualifications to enter public lands, contained in said section, extends to officers, clerks and employés in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of public lands.

In accordance with said decision all officers, clerks and
28 employés in the offices of the surveyors-general, the local land offices and the General Land Office, or any persons, whatever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering or becoming interested, directly or indirectly, in any of the public lands of the United States.

The statute then has been construed to absolutely disqualify any one employed in the General Land Office whether located in the city of Washington or not, from acquiring any title whatever to any of the public lands during the period in which he is employed.

In Williams *v.* Seidler (15 L. D., 266), it was held that—

Section 452 R. S., does not prohibit a homesteader from completing his title, by due compliance with law, who after making his entry accepts and holds an appointment in the General Land Office that gives no advantage over the general public in the matter of prosecuting his claim.

A motion for review in this case was denied by Secretary Noble (16 L. D., 66). But in that case the entry was made prior to the time at which the party became an employé. His right had, to some extent at least, become vested, and the decision (*supra*) allowed him to complete that which had been legally initiated.

The object of the Statute, in disqualifying the employés of the General Land Office, was to prevent their use of such knowledge as came to them in an official way, to their private benefit; hence it follows, that an entry made prior to the time of becoming connected with the office should stand for the reason that he did not have, and could not have had, any superior sources of information over his neighbors, and it would be a manifest injustice to destroy the rights of a *bona fide* entryman of the public lands on that ground that subsequently he became an officer or agent of the government in relation to the public lands.

29 It is urged in behalf of the entryman that he acted under a letter from the Commissioner of the General Land Office, and that under the circumstances, he is entitled to special consideration.

The letter referred to is as follows:

It is held by this office that the case of Mr. Prosser does not come within the inhibition contained in section 452, Revised Statutes, and that a special Timber agent may be entitled to the pre-emption privilege, not being employed in the General Land Office at Washington. The Circular of August 23, 1876, issued by this office, under the Hon. Secretary'- decision of August 3, 1876, (3 Copp's Land Owner, forbids the entry of public lands by clerks and employés in the local offices, but does not apply to special agents.

That letter was written in reference to another claim of Prosser's and the facts in that case were similar to the case of Winans *v.* Beidler before cited. Prosser had, prior to the time of his appointment as special agent, made a pre-emption filing and upon his offering final proof subsequent to his becoming an agent the local officers refused to accept it, and upon the matter being brought to the attention of the Commissioner, the letter quoted was written. Under the facts in the case Prosser was entitled to make final proof, and while the letter of the Commissioner does say that the law does not apply to special agents, as a matter of law it did, and the construction therein given to section 452 R. S. was in error.

When the object of the act is considered, it will be seen that it applied with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge the use of which it was the intention of the act to prevent.

It follows from what has herein been set out, that the decision of this department of date July 7, 1893, was in error and
30 the same is hereby set aside; and the decision of your office is affirmed.

The papers transmitted with your office letter "H" of September 6, 1893, are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

STATE OF WASHINGTON, *County of Yakima, ss:*

William F. Prosser, being first duly sworn, on oath says: That he is the plaintiff in the above entitles action; that he has read the foregoing complaint knows the contents thereof and believes the same to be true.

WILLIAM F. PROSSER.

Subscribed and sworn to before me this 26th day of November, A. D. 1904.

JAS. P. WETER,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

Endorsed: Filed Dec. 5, 1904. J. W. Day, County Clerk, By Edw. E. Cleaver, Deputy.

31 In the Superior Court of Yakima County, State of Washington.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Demurrer.

Come now the defendant above named and demurs to the complaint of plaintiff in the above entitled action and as grounds for such demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action.

JOHN J. RUDKIN,
Attorney for Defendant.

Copy mailed December 19th, 1904.

Endorsed: Filed April, 10th 1905. J. W. Day, County Clerk.

32 In the Superior Court of Yakima County, State of Washington.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Order.

This cause coming on regularly to be heard on defendant's demurrer to plaintiff's complaint herein, James B. Reavis appearing for plaintiff and John J. Rudkin appearing as attorney for defendant, and the court being fully advised in the premises, and it appearing that the complaint of plaintiff does not state facts sufficient to constitute a cause of action, it is ordered that defendant's demurrer to said complaint be and the same is hereby sustained; and it is further ordered that plaintiff be and he is hereby allowed Twenty days to plead further in said action, from date hereof.

Dated this 17th day of May, 1905.

H. B. RIGG, *Judge.*

Endorsed: Filed for Record, May 17th 1905. J. W. Day, County Clerk, by Edw. E. Cleaver, Deputy.

33 In the Superior Court of the State of Washington for Yakima County.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Exceptions to Order Ruling on Demurrer.

Now comes the plaintiff in said cause and excepts to the order heretofore entered into said cause, sustaining said demurrer to the complaint and allowing time to said plaintiff to plead further, and prays that his exceptions be allowed and plaintiff elects to stand upon said complaint, and files this pleading under said order sustaining the demurrer.

JAMES B. REAVIS,
Attorney for Plaintiff.

Address 546 N. Y Block, Seattle Washington.

Endorsed: Filed June 6th, 1905. J. W. Day, County Clerk.

34 In the Superior Court of Yakima County, State of Washington.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

This cause coming on regularly this day to be heard on motion of John J. Rudkin, attorney for defendant, for judgment; and it appearing to the Court that an order has been heretofore entered in this cause sustaining a demurrer to plaintiff's complaint for the reason that the same does not state facts sufficient to constitute a cause of action; that plaintiff has declined to plead further herein and has elected to stand on his complaint herein; and the Court being fully advised in the premises, it is considered, ordered and adjudged that said cause be and is hereby dismissed for the reason that said complaint does not state facts sufficient to constitute a cause of action against said defendant, and it is further ordered that defendant have and recover from plaintiff his costs to be taxed, and that execution issue therefor.

Done this 13th day of June, 1905.

H. B. RIGG, *Judge.*

Endorsed: Filed for record June 13th 1905, and recorded in Vol. L of Superior Court Journal, page 235. J. W. Day, County Clerk.

35 In the Superior Court of the State of Washington in and for Yakima County.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Notice of Appeal.

To said defendant, George L. Finn, and John D. Rudkin, his attorney:

Please take notice that said plaintiff, William F. Prosser, hereby appeals from that certain judgment made and entered in said cause by said Court on the 13th day of June, 1905, in favor of said defendant, George L. Finn, and against said plaintiff, dismissing said action at cost of said plaintiff and from the whole thereof.

Dated this 8th day of September, 1905.

JAMES REAVIS,
Attorney for Plaintiff.

P. O. Address 546 New York Block.

36 In the Superior Court of the State of Washington in and for the County of King.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Affidavit.

STATE OF WASHINGTON, *County of King, ss:*

M. J. Fidlar, being first duly sworn on oath, says: That I am a citizen of the United States and resident of the County of King, and over the age of twenty-one years, and not a witness in said cause, and not a party to said cause, that on the 8th day of September, 1905, I, at the direction of counsel for plaintiff in said cause, deposited in the United States Post Office at the City of Seattle, in a sealed envelope, a true copy of the annexed notice of appeal in said cause, addressed to Mr. John J. Rudkin, Attorney for defendant in said cause, North Yakima, Yakima County, Washington, and prepaid the proper postage thereon, and that there is daily mail connection between said City of Seattle and said North Yakima, and that said John J. Rudkin, attorney for said defendant in said cause, has his post office address, and keeps his law office in said City of North Yakima, and is a resident thereof, and that I, at the same time and within the same enclosure deposited a true copy of the Bond on Appeal in said cause.

M. J. FIDLAR.

Subscribed and sworn to before me this 8th day of September 1905.

W. W. DELONG,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

Endorsed: Filed for Record, Sep'r 9th, 1905. J. W. Day, County Clerk, By Edw. E. Cleaver, Deputy.

37 In the Superior Court of the State of Washington in and for Yakima County.

WILLIAM F. PROSSER, Plaintiff,
vs.
GEORGE L. FINN, Defendant.

Bond.

This bond witnesseth, that we, William F. Prosser, as principal, and Thomas W. Prosch and J. G. Gleason as sureties, are hereby held and firmly bound unto George L. Finn, in the sum of Two Hundred ($200.00) Dollars, in lawful money of the United States,

for the payment of which said sum we bind ourselves our heirs, executors and administrators, firmly by these presents.

Witness our hands this 12th day of Sept. 1905.

Now the conditions of this obligation are such that whereas, the above George L. Finn, as defendant in the above entitled action in said court recovered judgment against said William F. Prosser, principal herein, on the 13th day of June, 1905, for dismissal and costs in said action, and whereas, said Prosser has appealed from said judgment to the Supreme Court, now therefore, if the said bounden principal shall well and truly pay all costs and damages on said appeal or on the dismissal thereof, not exceeding the sum of $200.00, then this obligation shall be void, otherwise it shall remain in full force and effect.

WILLIAM F. PROSSER.
J. P. GLEASON.
THOMAS W. PROSCH.

38 STATE OF WASHINGTON, *County of King, ss:*

Thomas W. Prosch and J. G. Gleason, being first duly sworn each for himself says. I am one of the above sureties and a resident of said state, and I am worth the sum of $400.00 in property in this State, over and above all debts and liabilities, exclusive of property exempt from execution.

THOMAS W. PROSCH.
J. P. GLEASON.

Subscribed and sworn to before me this 13th day of Sept. 1905.

[NOTARIAL SEAL.] W. W. DELONG,
Notary Public in and for the State of Washington, Residing at Seattle.

Endorsed: Filed for Record, Sept. 14th, 1905. J. W. Day, County Clerk.

39 STATE OF WASHINGTON, *County of Yakima, ss:*

I, J. W. Day, County Clerk and *ex-officio* Clerk of the Superior Court of the State of Washington, in and for the County of Yakima, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the files and records in the above entitled action as I have been by the appellant directed to transmit to the Supreme Court of the State of Washington.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Superior Court at North Yakima, this 26th day of September, A. D. 1905.

[SEAL.] J. W. DAY,
County Clerk and Ex-Officio Clerk of said Superior Court.

Endorsed: Filed Sep. 9, 1905. J. W. Day County Clerk, —— —— Deputy.

40 No. 5903.

Filed Feb. 14th, 1906.

WILLIAM F. PROSSER, Appellant,
vs.
GEORGE L. FINN, Respondent.

Plaintiff brought this action, praying that he be decreed the owner of a certain described quarter section of land in Yakima county. The lower court sustained a general demurrer to the complaint. Plaintiff elected to stand upon the allegations of the complaint and the cause was dismissed. Plaintiff appealed.

The facts stated in the complaint are, in substance, as follows: On October 18, 1882, appellant made a timber culture entry on the land in question at the United States land office at North Yakima, Washington. At the time he made this entry he was a special timber agent, having been appointed by the commissioner of the general land office on July 26, 1880. His term of office as such special agent expired in the year 1885. After filing upon the land, he commenced improving and cultivating and growing trees thereon, and complied diligently with the timber culture law. He spent considerable sums of money in planting and replanting trees and in constructing ditches to irrigate the land, until the year 1889. On the 28th day of October, 1889, one John A. Walker filed a contest in the local United States land office at North Yakima against the entry of appellant, upon the ground that appellant had not complied with the timber culture entry law, and subsequently on December 9, 1889, said Walker filed a supplemental affidavit, alleging that appellant was incompetent to make the original timber culture entry because he was at the time of the entry a special agent or timber inspector appointed by the commissioner of the general land office. Upon the hearing of this contest, the local land office found, that the appellant had in good faith endeavored to comply with the law and that no bad faith could be imputed to him; that he had expended
41 considerable time and money attempting to grow timber; that the contestant, John A. Walker, had known several years before the contest was instituted that the appellant, at the time of the entry, was a special agent in the land department, and that said Walker stood by and saw the cultivation and improvement going on and knew of the expenditures being made by the appellant on the land in controversy until 1889, when the land had trebled in value by reason of the improvements made thereon; but held that the entry originally made was prohibited by § 452 of the United States revised statutes, and for that reason canceled the entry. From this decision of the local land office, appellant appealed to the commissioner of the general United States land office, where the judgment was affirmed on the ground that the appellant was a special agent at the time of the initiation of his entry. An appeal was thereupon taken to the secretary of the interior, and that officer, by his first assistant, reversed the decision of the commissioner of the general land office

and directed a dismissal of the contest, and held that appellant was entitled to the land. Upon petition for review, which was heard by the succeeding secretary of the interior, the decision of the former secretary was reversed, and the decision of the commissioner of the general land office was affirmed, with directions to the local land officers to cancel the entry of appellant. Thereafter said John A. Walker filed upon the land. Subsequently his filing was successfully contested by George L. Finn, respondent in this action. Mr. Finn thereupon filed upon the land in controversy, and in due time made final proof and received a patent from the government of the United States. The complaint alleged that the respondent had notice and knowledge of all of appellant's improvements and expenditures, equities, and rightful claims to the land, prior to the time respondent filed on the land in question.

Section 452, U. S. Rev. Stats., provides:

"The officers, clerks, and employees in the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and any person who violates this section shall forthwith be removed from office."

42 Under the provisions of this section, it is perfectly clear that appellant, being a special agent and in the employ of the general land office, was prohibited from making an entry upon the land at the time the original entry was made. His entry was therefore invalid. In addition to the plain terms of the statute, the land department of the government has held since the year 1876, which was long prior to the entry of the appellant, that registers and receivers, their clerks and employees, and all persons intimately connected with such officers were included within the terms of the statute and were prohibited from making entries on public lands.

Nebraska *v.* Dorrington, 2 Copp's Public Land Laws, 647.

In 1890, the commissioner of the general land office held that the section above quoted applied to an employee in the office of the surveyor general of the district in which the land was situated.

Herbert McMicken *et al.*, 10 Land Dec. 97, 11 Land Dec. 96;
Circular Letter, Sept. 15, 1890, 11 Land Dec. 348.

This construction of the statute appears to have been followed by the land department ever since that time.

Miller *v.* Colman, 18 Land Dec. 394;
Robert J. Watson, 33 Land Dec. 435, decided Feb. 25, 1905.

All these decisions are clearly right.

The only case cited which shows a construction of the statute by the land department different from these cases is Grandy *v.* Bedell, 2 Land Dec. 314, which appears never to have been followed, because it was clearly against the plain provisions of the statute upon the point under consideration. It is true this last named case was decided prior to the entry of the appellant upon the land in question. It is also true that appellant had, prior to his

entry, received a letter from the commissioner of the general land office, to the effect that the provisions of § 452, U. S. Rev. Stats., did not apply to special agents; but this letter had reference to a case where appellant had made another filing upon another piece of land prior to his appointment as special agent, and sought
43 to and did afterwards make final proof thereon. It was not written in contemplation of an original entry of a new tract of land. Under the plain terms of the statute the advice was erroneous and no rights were acquired in violation of the law. If the appellant's rights under the law have been erroneously denied by the land department, he may obtain redress in the courts. But where no error has been made in the cancellation of his entry, and no legal rights have been denied him by the land department, the ruling of that department is conclusive, and he cannot be heard to complain against one who was in no wise connected with the matters in controversy.

Shipley *v.* Cowen, 91 U. S. 330.

This respondent apparently had no connection with the case of Walker *v.* Prosser, and was not interested therein until long after the entry of appellant had been cancelled. After Mr. Walker succeeded in his contest, and had filed on the land, and by some default not shown had forfeited his entry, then this respondent, with notice of all the proceedings, was permitted to file upon the land and acquire patent thereto. No reason is shown in the complaint why the respondent should be held to be a trustee of the title for the benefit of appellant, except the mere fact that, at the time respondent filed on the land, he knew that the appellant claimed some interest therein by reason of improvements made many years before. But respondent also knew, necessarily, that appellant had no legal claim to the land, because such claim had long since been terminated adversely to him by a tribunal competent for that purpose.

We think the complaint for these reasons fails to state a cause of action against the respondent. The judgment is, therefore, affirmed.

MOUNT, *C. J.*

We concur:

HADLEY, *J.*
FULLERTON, *J.*
ROOT, *J.*
CROW, *J.*

44 In the Supreme Court of the State of Washington.

SATURDAY, *March 17th*, 1906.

No. 5903.

WILLIAM F. PROSSER, Appellant,
vs.
GEORGE L. FINN, Respondent.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the Superior Court of Yakima County and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing it is now on this 17th day of March, A. D. 1906, on motion of Rudkin & Luhman of counsel for respondent considered, adjudged, and decreed that the judgment of the said Superior Court be and the same is hereby affirmed with costs and that the said George L. Finn have and recover of and from the said William F. Prosser and from Thomas W. Prosch and J. G. Gleason sureties the costs of this action taxed and allowed at Forty-One & 00/100 Dollars, and that execution issue therefore. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance with the opinion herein filed.

45 In the Supreme Court of the State of Washington.

No. —.

WILLIAM F. PROSSER, Plaintiff and Appellant,
vs.
GEORGE L. FINN, Defendant and Respondent.

Petition for Writ of Error.

To Honorable Wallace Mount, Chief Justice of the Supreme Court of Washington:

The petition of the above named appellant hereby shows:

That on the 14 day of February, 1906, the said Supreme Court of the State of Washington made and entered a final order and judgment herein in favor of George L. Finn, respondent, against your petitioner, in which final order and judgment and prior proceedings therein certain errors were committed to the manifest prejudice of your petitioner, all of which will appear more in detail from the assignment of errors, which is filed with this petition.

That the said Supreme Court of the State of Washington is the highest court of law or equity in this state in which a decision in this suit can be had.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Washington for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Dated this 7th day of May, 1906.

REAVIS, THORP & WHEELER,
Attorneys for Petitioner.

Endorsed: 5903. Petition for Writ of Error. Filed May 10, 1906. C. S. Reinhart, Clerk.

46 In the Supreme Court of the State of Washington.

WILLIAM F. PROSSER, Plaintiff and Appellant,
vs.
GEORGE L. FINN, Defendant and Respondent.

Assignment of Errors.

William F. Prosser, appellant, by his attorney, in connection with the petition for a writ of error herein, makes the following assignment of errors, which appellant avers occurred in the proceedings, final order and judgment herein dated the 14 day of February, 1906, to-wit:

I.

The Court erred in holding that the complaint of plaintiff did not state facts sufficient to state a cause of action.

II.

The court erred in sustaining the demurrer of the defendant to the complaint of plaintiff.

III.

The court erred in rendering judgment against this plaintiff, whereas judgment ought to have been rendered in favor of plaintiff.

IV.

The Court erred in its interpretation of Section 452 Revised Statutes of the United States in its application to plaintiff's timber culture entry; in that it was held that said section was prohibitive of plaintiff's equities as shown in the facts detailed in the complaint.

V.

The Court erred in its interpretation and construction of the rule ordered in the circular of August 23, 1876—3 Copps.
47 L. O. 122 which reads: "Pursuant to instructions from the Hon. Secretary of the Interior of the 3rd inst., you are hereby

advised that the registers and receivers, and their clerks and employés, and those intimately and confidentially related to the registers and receivers, their clerks and employés, will not be permitted, under any circumstances, to make entries of public lands at the district offices over which they respectively have control, or in which they are respectively employed; and that upon satisfactory proof that this regulation has been violated, the officer offending will be reported to the executive for removal.

"This regulation is not intended to apply to cases provided for in section 2278 of the Revised Statutes of the United States, where parties initiate claims under the pre-emption of homestead laws, and are subsequently appointed registers and receivers." In that said Court held that said circular applied to special timber agents.

VI.

The Court erred in its construction of the decision of the Secretary of the Interior in Nebraska *vs.* Harrington, Copps L. L. 1882; in that the Court held the said decision applied to special timber agents.

VII.

The Court erred in holding that the decisions in the Interior Department prior to plaintiff's initial filing, or entry, had been adverse to his right to make said entry.

VIII.

The Court erred in not holding that the iniform rulings in the executive department for a long time prior to plaintiff's entry, were, that: in the absence of a contest or forfeiture the entryman whose entry was invalid at the time when made, if followed up in good faith after the invalidity was removed had vested equities in the land.

48

IX.

The Court erred in not holding that the ruling and advice of Commissioner McFarland to the Olympia Land Office prior to plaintiff's entry, which ruling was as follows: "It is held by this office that the case of Mr. Prosser does not come within the inhibition contained in section 452, Revised Statutes, and that a special timber agent may be entitled to the pre-emption privilege, not being employed in the general land office at Washington. The Circular of August 23, 1876, issued by this office, under the Hon. Secretary's decision of August 3, 1876, 3 Copp's Land Owner, forbids the entry of public lands by clerks and employés in the local offices, but does not apply to special agents," did not excuse the invaliaity of the initial entry of plaintiff, when such invalidity ceased some five years before the contest was instituted.

X.

The court erred in construing said section 452 of Revised Statutes United States as demanding a forfeiture of the equities of

plaintiff under the fact stated in the complaint after the uniform construction of the executive department had theretofore recognized vested equities, when the invalidity of the entry had been cured by time and the entryman was competent to finish his compliance with the provisions of the law.

Wherefore the plaintiff prays that the said judgment may be reversed.

REAVIS, THORP & WHEELER,
Attorney- for Plaintiff.

Endorsed: 5903. Assignment of Errors. Filed May 10, 1906. C. S. Reinhart, Clerk.

49 In the Supreme Court of the State of Washington.

WILLIAM F. PROSSER, Plaintiff and Appellant,
vs.
GEORGE L. FINN, Defendant and Respondent.

Order Allowing Writ of Error.

The above entitled matter coming on to be heard on the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter: It is ordered that on the filing of a good and sufficient bond conditioned according to law in the sum of five hundred Dollars, the said writ of error is hereby allowed.

WALLACE MOUNT,
Chief Justice of the Supreme Court of State of Washington.

Endorsed: 5903. Order Allowing Writ of Error. Filed May 10, 1906. C. S. Reinhart, Clerk.

50 In the Supreme Court of the State of Washington.

WILLIAM F. PROSSER, Plaintiff in Error,
vs.
GEORGE L. FINN, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that we, William F. Prosser as principal, and Griffith Davies and James P. Gleason as sureties are held and firmly bound unto George L. Finn, defendant in error, in the sum of Five Hundred Dollars to be paid to the said obligee his

heirs, executors, administrators and assigns, for which payment well and truly to be made, we do hereby bind ourselves, and each of us, and each of our successors and assigns, firmly by these presents.

Dated the 17th day May, 1906.

Whereas the above named plaintiff in error, William F. Prosser, has prosecuted a writ of error from that certain judgment rendered and entered in the Supreme Court of the State of Washington on the 14 day of February, 1906, wherein it was adjudged and decreed that the plaintiff in error recover nothing therein, and that defendant therein recover his costs against plaintiff,

Now, Therefore, the condition of this obligation is such that if the said plaintiff in error shall prosecute his writ of error to effect, and answer all damages and costs, and make his prayer good, then this obligation to be void; otherwise to remain in full force and effect.

WILLIAM F. PROSSER.
GRIFFITH DAVIES.
JAMES P. GLEASON.

STATE OF WASHINGTON, *County of King, ss:*

Griffith Davies and James P. Gleason being first duly sworn on oath, each for himself says:

51 I am a resident of said State of Washington, and worth in property now in this state over the sum of Five Hundred Dollars, above all my just debts and property exempt from execution.

GRIFFITH DAVIES.
JAMES P. GLEASON.

Subscribed and sworn to before me this 17th day of May, 1906.

[SEAL.] N. S. PETERSON,
Notary Public in and for the State of Washington, Residing at Seattle.

Approved this 18th day May 1906.

WALLACE MOUNT,
Chief Justice Supreme Court of State of Washington.

Endorsed: 5903. Bond on Writ of Error. Filed May 18, 1906, C. S. Reinhart, Clerk.

52 In the Supreme Court of the United States.

WILLIAM F. PROSSER, Plaintiff in Error,
vs.
GEORGE L. FINN, *Plaintiff* in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Washington, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity in which a decision could be had in the said suit between William F. Prosser and George L. Finn, wherein was drawn in question the construction of a statute of the United States, and the authority of a commission held under the United States, and the said decision was against the right, title, and privilege especially set up and claimed under said Statute and commission, a manifest error hath happened to the great damage of the said William F. Prosser, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that under your seal distinctly and oppenly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have it at Washington, within sixty (60) days from the date of this writ in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court
53 may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 10th day of May, 1906.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk U. S. Circuit Court Western District of Washington.
By H. M. WALTHEW, *Deputy.*

Allowed by
WALLACE MOUNT,
Chief Justice of the Supreme Court of the State of Washington.

53½ [Endorsed:] 5903. In the Supreme Court of the United States. William F. Prosser, Plaintiff in error, *vs.* George L. Finn, Defendant in error. Writ of Error Filed May 16 1906 C. S. Reinhart clerk. Reavis, Thorp & Wheeler Attorneys for —— 546 New York Block Seattle, Washington.

54 The Supreme Court of the United States.

WILLIAM F. PROSSER, Plaintiff in Error,
vs.
GEORGE L. FINN, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To George L. Finn:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within sixty (60) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Washington, wherein William F. Prosser is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, in said writ of error mentioned, should not be corrected and why speedy justice to the parties in that behalf should not be done.

Witness the Honorable Wallace Mount, Chief Justice of the Supreme Court of the State of Washington, this 18 day of May, 1906.

[Seal of the Supreme Court, State of Washington.]

WALLACE MOUNT,
Chief Justice of the Supreme Court of the State of Washington.

Attest:
C. S. REINHART, *Clerk.*

55 [Endorsed:] 5903 Copy No. — Department No. — In the Supreme Court of the United States. William F. Prosser, Plaintiff in error, *vs.* George L. Finn, Defendant in error. Citation. Reavis, Thorp & Wheeler, Attorneys for Plaintiff in error. 546 New York Block Seattle, Washington. Filed May 24 1906 C. S. Reinhart Clerk.

Receipt of a copy of within citation and due service hereof admitted this 22nd day of May 1906

RUDKIN & LUHMAN,
Attorneys for George L. Finn, Defendant in Error.

56 In the Supreme Court of the State of Washington.

No. 5903.

WILLIAM F. PROSSER, Appellant,
vs.
GEORGE L. FINN, Respondent.

I, C. S. Reinhart, clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause, and that in pursuance of the Writ of Error heretofore filed in this cause I now transmit said transcript together with the Original Writ of Error and Original Citation to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at Olympia this 26th day of June, 1906.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk*.

Endorsed on cover: File No. 20,307. Washington supreme court. Term No. 342. William F. Prosser, plaintiff in error, *vs.* George L. Finn. Filed July 14th, 1906. File No. 20,307.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 64.

WILLIAM F. PROSSER, PLAINTIFF IN ERROR,

v.

GEORGE L. FINN.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to the Supreme Court of the State of Washington.

The plaintiff in error, plaintiff below, filed his complaint in the Superior Court of Washington for Yakima County (pp. 2-17), showing that by virtue of his entry upon certain public land, and the planting and cultivation of trees thereon in conformity with the laws of the United States pertaining to timber culture, he had acquired equitable rights in said land, which were entitled to priority over those of the defendant, to whom the United States had issued a patent for the land in consequence of errors of law committed by the Land Department in ordering the cancellation of plaintiff's entry. He prayed the court that he be decreed the owner of the land; that the defendant be decreed the holder of the title in trust for him, and as such trustee be required to convey the same to him. The defendant filed a general demurrer (p. 17), which was sustained (p. 18), and judgment was entered dismissing the cause (p. 19). Plaintiff appealed, and on

March 17, 1906, that judgment was affirmed by the supreme court of the state (p. 25). In due course plaintiff sued out this writ of error (pp. 25-29).

The facts stated in the complaint are as follows (pp. 2-17): On October 18, 1882, the plaintiff, Prosser, filed a timber-culture entry on the land in dispute, being lots 1, 2, 5, 8, and 10, Sec. 2, T. 8 N., R. 24 E., in the land office at North Yakima, Washington. At that time he was employed as special timber agent in the district in which the land was situated, having been appointed to that office in the year 1880. In 1882, prior to filing his timber-culture entry, Prosser had tendered final proof under a pre-emption entry that he had made upon another tract of land, but the local land office at Olympia refused to accept his proof, holding that he, being a special timber agent, was prohibited by law from acquiring any public land. The statute on which the Land Department based this decision was Sec. 452, R. S. U. S., which provides:

> "The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

On appeal, the commissioner of the General Land Office had reversed the decision of the local office, and in a letter directed to the register and receiver on July 22, 1882, said (p. 12):

> "It is held by this office that the case of Mr. Prosser does not come within the inhibition contained in section 452, Revised Statutes, and that *a special timber agent may be entitled to the pre-emption privilege, not being employed in the General Land office at Washington.* The circular of August 23, 1876, issued by this office, under the honorable Secretary's decision of August 3, 1876 (3 Copp's Land Owner, 122), forbids the entry of public land by *clerks and employees in the local land offices, but does not apply to special agents.*"

Thus assured of his status, Prosser filed his timber-culture entry. From October 1882, until the autumn of 1889, he planted trees and cultivated and improved the land, and in all other respects complied with the laws of the United States pertaining to timber culture, and in so doing expended a great deal of labor and considerable sums of money. In the year 1885 his term of office as special agent expired. On October 28, 1889, one John A. Walker filed a contest in the local land office against Prosser's entry, alleging that he had not complied with the timber-culture law in the matter of planting trees. Subsequently Walker filed a supplemental affidavit, charging that Prosser was disqualified from making his entry by reason of his employment as special timber agent (p. 4, Exhibit "A"). For several years prior to filing his contest, Walker had knowledge of Prosser's entry and the work that he was doing upon the land, and knew that Prosser was a special timber agent at the time of making the entry, but he deferred making his contest until the land had been trebled in value, in consequence of its cultivation and improvement by Prosser. Upon the hearing of this contest, in 1890, the register and receiver held that the Commissioner had erred in ruling that a special timber agent was not within the inhibition of the Statute (Sec. 452, R. S. U. S.), and that, although Prosser made his entry in good faith, relying upon the commissioner's decision, and had cultivated the land in conformity with law, his entry was made contrary to law and should be canceled (pp. 7-9).

On Prosser's appeal, the commissioner affirmed the decision of the local office, saying that the decision of his predecessor, in Prosser's pre-emption case, was in conflict with the statute and a departmental regulation (pp. 9-11).

On appeal to the Secretary of the Interior, the commissioner's decision was reversed and Walker's contest was ordered dismissed (pp. 11, 12, 13). In his opinion the secretary (acting) said that, although rulings of the Depart-

ment, announced after the date of Prosser's entry, had declared that special agents were within the inhibition of the statute, nevertheless such was not the ruling of the Land Department when that entry was made; that cancellation of the entry would work injustice, because Prosser had entered upon the land in good faith and had cultivated and improved it, in conformity with law, for a period of seven years before the contest was filed; that he had not been in the Government employ for four years prior to the filing of the contest, and that, even if he were prohibited from making the entry originally, his disability was cured before the contest was initiated and before any adverse rights attached. Stress was laid upon the fact that Walker, the contestant, had stood by and seen the land improved by Prosser for seven years before contest.

Walker moved for a review of the acting secretary's decision. The motion was granted by the secretary, who set aside the former decision and directed that Prosser's entry be canceled (pp. 14-17; 18 L. D., 425). In his opinion the secretary relied upon departmental decisions and circulars which were published some years after the date of Prosser's entry and even after the filing of Walker's contest. Again, he overlooked the point made by the acting secretary, to the effect that, if Prosser had been disqualified when he made the entry, the defect would have been cured by his four years' tenure and cultivation of the land after he left the service of the government and before the filing of Walker's contest (p. 3).

Upon the cancellation of Prosser's entry, Walker filed upon the land, but later his entry was successfully contested by Finn, the defendant in this cause, who, with full notice and knowledge of the above proceedings and of Prosser's work done and expenditures made for the cultivation and improvement of the land, filed an entry and subsequently received a patent (p. 4).

Thereafter this suit was brought, with the result stated at the outset of this brief. The grounds upon which the Su-

perior Court dismissed the complaint and upon which the Supreme Court affirmed its judgment were:

First. The entry made by Prosser, while employed as special timber agent, was made in violation of section 452, R. S. U. S., and was void.

Second. The said entry, being invalid at its inception because of Prosser's disability, could not be validated later by the removal of his disability, even though he were entitled to make a similar entry on the date of Walker's contest and had been so entitled for years prior thereto.

Specification of Errors.

The errors of the Supreme Court of the State of Washington, asserted by the plaintiff in error and intended to be urged, are as follows:

1. The court erred in holding that on October 18, 1882, the plaintiff, then being employed by the United States as a special timber agent, was prohibited by section 452, R. S. U. S., and regulations of the Land Department from entering public land of the United States, and that his entry then made upon the land in dispute was void.

2. The court erred in failing and refusing to hold that the plaintiff's entry upon the land in dispute, if originally prohibited by section 452, R. S. U. S., or an existing regulation of the Land Department, would have been validated by (1) the removal of plaintiff's disqualification, which occurred three years after the date of his entry and four years before the date of the contest which resulted in its cancellation, and (2) the fact that the plaintiff made his entry in good faith, relying upon a decision of the Land Department, and thereafter, acting in good faith and at large expense, had done and performed all things requisite for the acquisition of the said land under the laws of the United States relating to timber culture.

3. The court erred in failing and refusing to hold that the defendant, having had notice of all proceedings with respect to the plaintiff's entry upon the land in dispute and of the plaintiff's work done and expenditures made in and about the cultivation and improvement of the said land, and having obtained the legal title to the same by patent, in consequence of errors of law committed by the Land Department in the cancellation of plaintiff's entry, should be held to be a trustee of the title to the said land for the benefit of the plaintiff.

4. The court erred in holding that the complaint did not state facts sufficient to constitute a cause of action.

5. The court erred in dismissing the cause.

ARGUMENT.

We contend that the plaintiff is entitled to the relief prayed in his complaint, for that:

I. The plaintiff's entry upon the land in dispute was valid in its inception. (*a*) Special timber agents or inspectors are not "officers, clerks, or employees in the General Land Office" within the meaning of section 452, R. S. U. S., and are not thereby prohibited from entering public land. (*b*) As interpreted and administered by the Land Department when the plaintiff's entry was made, the prohibition contained in section 452, R. S. U. S., did not extend to special timber agents. This cause must be determined in conformity with the contemporaneous interpretation of the law by the Land Department. (*c*) If the prohibition contained in section 452, R. S. U. S., had extended to special timber agents, it would not have rendered the plaintiff's entry void or liable to cancellation, but merely rendered plaintiff liable to removal from his office.

II. If the plaintiff had been disqualified by law from entering public land when he made his entry upon the land in dispute, the entry would have been validated by the removal of his disability, which occurred four years before the date of the contest wherein his entry was canceled. The removal of his disability, coupled with the fact that plaintiff made his entry in good faith and in conformity with a decision of the Land Department, and for a period of seven years subsequent to his entry and prior to the contest had done and performed all things requisite for the acquisition of the land under the land laws of the United States, would have been sufficient to cure the defect in his entry if it had been defective originally.

III. The defendant entered upon the land in dispute with full notice of all proceedings had with respect to the entry theretofore made thereon by the plaintiff, and of the plaintiff's work done and expenditures made in and about the cultivation and improvement of the land; therefore the defendant, having obtained legal title to same by patent from the United States in consequence of errors of law committed by the Land Department in canceling plaintiff's entry, should be decreed to hold the title for the benefit of the plaintiff.

These propositions will be taken up in their order.

I.

The plaintiff's entry was valid in its inception.

(a) Special timber agents are not "officers, clerks, or employees in the General Land Office" within the meaning of section 452, R. S. U. S., and are not thereby prohibited from entering public land.

The court below held that Prosser, being a special timber agent when he made his entry, was prohibited by section

452, Revised Statutes, from entering public land (p. 23). The section reads:

> "The officers, clerks and employees *in the General Land Office* are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

This is a revision of section 14 of the act of July 4, 1836, (*5 Stat. L., 107, 112*), entitled *"An act to reorganize the General Land Office."* From the first section it will be seen that the object of the act was to regulate the discharge of executive duties prescribed by law "appertaining to the *surveying* and *sale* of the public lands of the United States, or in anywise respecting such public lands." By subsequent sections of the act there were created certain offices, subordinate to that of the commissioner of the General Land Office, to be filled by appointments made by the president with the advice and consent of the Senate. These included a principal clerk of public lands, a principal clerk of private land claims, a principal clerk of surveys, a recorder of the General Land Office, and a solicitor, all of them to be employed in the main or General Land Office in Washington. By section 10 the salaries of the commissioner and three subordinates were fixed. The last section (14) read:

> *"That all and every of the officers whose salaries are hereinbefore provided for are hereby prohibited from directly or indirectly purchasing or in any way becoming interested in the purchase of any of the public land;* and in case of a violation of this section by such officer and on proof thereof being made to the President of the United States, such officer, so offending, shall be forthwith removed from office."

While laws of this kind, enacted for the suppression of a public wrong or to effect a public good, are not penal acts in the ordinary sense and are to be interpreted liberally, in

order to accomplish the intention of the legislature, it is not competent for the judiciary to extend the scope of disabilities or forfeitures expressly stipulated. In the revision of section 14, Congress extended its operation beyond "the officers whose salaries were provided for" in the act of 1836; but it is notable that the prohibition of the present statute is limited to "officers, clerks and employees *in the General Land Office,*" and, without further legislative enactment or executive regulation having the force of law, that prohibition could not be made to embrace officials or employees of local land offices. This appears to have been the view taken by numerous Secretaries of the Interior charged with the administration of the present law.

The earliest reported case dealing with that question is *State of Nebraska v. Dorrington* (*2 Copps L. L., 647*), decided in 1876. It involved a contest of a timber-culture entry made by *a clerk in a local land office.* In his opinion the secretary said:

> "The rule of your office prohibiting *registers and receivers and their clerks* from making entries of public land, *although perhaps not based on positive statutory provisions,* is a wise and just rule, based upon principles of sound public policy and one that your office is authorized to prescribe."

The case of *Grandy v. Bedell* (*2 L. D., 314*), decided by Secretary Teller in 1883, was, likewise, a contest of a timber-culture entry. At the time of making his entry the claimant was a *receiver's clerk in a local land office,* and the question at issue was whether his entry had been made contrary to the statute. It was held:

> "It will be observed that the section quoted (452 R. S.), and this is the only statutory provision bearing on the subject, *does not extend to clerks in the district offices, but by its terms is confined to those employed in the General Land Office.*"

Again, in the case of the *Lock Lode claim* (*6 L. D., 105*), decided in 1887, the question was whether an entry upon mineral land by a deputy surveyor was forbidden by law, and the Secretary, after discussing the status of the claimant as a deputy surveyor, said:

> *"There is nothing in the statute preventing such entries, and so far as I can ascertain there has been nothing in any of the regulations of the Department to prevent their being made."*

As we have seen, the object of the act of 1836 (*supra*) was to regulate the discharge of executive duties with respect to the *surveying* and *sale* of public lands. Even if Sec. 452, R. S. U. S., had been intended to apply to officers, clerks or employees not in the main or *General Land Office,* there would be no justification for extending its prohibition to employees of the department whose duties do not relate to the *surveying* and *sale* of public lands.

In *McMicken's case* (*10 L. D., 97*), decided in 1890, it was held that *a clerk in the office of a surveyor general* was within the prohibition of the statute, and on that ground his entry upon public land was canceled. The secretary said:

> "This [Sec. 452, R. S.] is a generalization or enlargement of section fourteen of the act of 1836, which was regarded as superseding the act of 1812. By this enlargement the prohibition or disqualification is extended to all 'officers, clerks and employees in the General Land Office,' and is not limited to persons appointed or employed in an office created by the act of 1812 or to officers whose salaries are provided for by the act of 1836. Do the words 'General Land Office,' as used in section 452, quoted above, relate only to the main or central office, located at the seat of government, or were they intended by Congress to embrace, also, the local offices and offices of surveyors general, which may be termed the branches or arms of the central office, through which the Commissioner of the General

> Land Office discharges 'all executive duties devolved upon him by law appertaining to the *surveying* and *sale* of public lands'? (Rev. Stat., 453.) There are two leading subdivisions of the business of the General Land Office, namely, the *surveying* and *sale or disposal* of the public lands; the former is conducted primarily through the offices of the surveyors general and the latter through the local land offices."

In this case the Secretary so interpreted the statute as to enlarge its prohibition far beyond its limits as interpreted by his predecessors and, we submit, far beyond the limits justified by the language employed; still, he did limit it to persons whose duties appertain to the *survey* and *sale* of land.

Obviously the mischief which the original act and the revision were designed to prevent was the acquisition of public land by officials charged with the administration of the land laws and clothed with limited judicial authority, who, unless forbidden to acquire land, would be required to take part in the decision of cases to which they were parties or would be enabled to take undue advantage over the public in selecting desirable land.

In the Lock Lode case (*supra*) the Secretary said:

> "It is true the deputy surveyor is in one sense an officer of the United States in the mining district for which he is appointed. Now, it has been uniformly held by the Department that registers and receivers and their clerks cannot be allowed to make entries of public land in their respective land districts, except as provided in section 2287 of the U. S. Revised Statutes, *the reason being that they will be called to pass upon their own proofs, and are always in a much better position to ascertain the status of desirable tracts of land than outside parties* (State of Nebraska *v.* Dorrington *et al.*, 2 Copp's, 647, and circular of August 23, 1876, *Id.*, 1448). This is a wise and just rule, based upon sound principles of public policy.
>
> *"But it has also been ruled that a register, receiver, or clerk in a local land office may make a timber-*

> *culture entry in a district other than the one in which he is located, for there the reasons assigned for refusing the entry in their own districts do not exist.* Instructions August 28, 1883 (2 L. D., 313)."

Special timber agents are not authorized to pass upon any proofs or to take part in the survey or sale of land. Their duties carry them into forest regions, hence they are not in a better position than people in general to learn about lands available for timber culture entry, that is lands which are devoid of timber.

The office of special timber agent was not created by Congress, but by departmental regulation. Legislative acquiescence in its creation is found in appropriation acts alone. The duties of a special timber agent are not well-defined by law or departmental regulation. The origin of the office and the reasons for its creation were stated by this court in the case of *Wells v. Nickles* (*104 U. S., 444*), decided in 1882:

> "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful.
>
> *"The Department of the Interior, under the idea of protecting the lands of the Government from depredations on its timber, has gradually come to assert the right to seize what is cut and taken away from the public lands wherever it can be traced. In aid of this the registers and receivers of the land offices have been, by instructions from the Secretary of the Interior, constituted agents of the United States for these purposes, with power to appoint special agents under themselves.* If any authority from Congress to do this was necessary, it may be fairly inferred from appropriations made to pay for the services of these special timber agents.
>
> "But neither in these acts of Congress, nor in the instructions from the Department, are the powers of these special agents well defined."

The General Land Office has issued to registers and receivers of local offices numerous letters of instruction or circulars with regard to the duties of special timber agents. From these it appears that each timber agent is required to patrol his district with a view to preventing forest fires and the unlawful cutting of timber on public land, and, as far as possible, to discover and report all cases of trespass. It does not appear that a special timber agent was ever required or authorized to pass upon the validity of timber-culture entries or to take part in other proceedings with respect to the disposal of land so entered or any public lands whatsoever (1 L. D., 601-607; *Id.*, 620-621; *Id.*, 626-629; *Id.*, 634-635; *Id.*, 639-640; 2 L. D., 814; *Id.*, 819; *Id.*, 820; *Id.*, 822; *Id.*, 827-828; *Id.*, 832; *Id.*, 835; 12 L. D., 499). These reports contain three letters which were directed to Prosser by the Commissioner (1 L. D., 621; *Id.*, 634; 2 L. D., 828). By none of them was he ever called upon or authorized to investigate the validity of any entry or to furnish reports or advice with respect to the disposition of land. On the contrary, the commissioner wrote to him as follows (1 L. D., 634, 635):

> "*As a timber agent, you, of course, are not expected to look up fraudulent land entries*, but in connection with your duties you may, at times, be able to obtain information on matters above referred to, which, hereafter, may be of service to this office in detecting frauds."

In *Winans v. Beidler*, (*15 L. D., 266*), it was held that section 452, Revised Statutes, does not prohibit a homesteader from completing his title by due compliance with law, who after making his entry accepts and holds *an appointment in the General Land Office that gives no advantage over the general public in the matter of prosecuting his claim.*

From the foregoing it will be seen that special timber agents, because of the manner of their appointment and the

nature of their duties, are in no sense "officers, clerks or employees in the General Land Office" within the meaning of section 452, R. S. U. S.

Care should be taken to avoid confusing *special timber agents*, whose duties relate exclusively to the protection of the Government's interests in timber standing on public land, with *"special agents,"* who are appointed from time to time, as occasion may require, to investigate applications for patents supposed to have been made fraudulently; to attend hearings before registers and receivers; to procure and even give testimony, and to take part in the examination of witnesses (2 L. D., 807). For obvious reasons, it has been ordered that such "special agents" shall not enter public land (2 L. D., 313).

(*b*) *As interpreted and administered by the Land Department, when the plaintiff's entry was made the prohibition contained in section 452, R. S. U. S., did not extend to special timber agents. This cause must be determined in conformity with the contemporaneous interpretation of the law by the Land Department.*

Prosser made his entry upon the land in dispute in 1882, and cultivated and improved it in conformity with law until 1889, when his entry was contested. It is settled law that an entryman, while seeking to acquire public lands by proceedings in conformity with law, possesses equitable rights in the land. Where a party has acquired proprietary rights by virtue of his acts done in conformity with a statute as interpreted and administered by the officers of the Government charged with its execution, courts will not, without cogent reasons, apply a different construction to the statute and thereby destroy the vested rights; neither will the courts permit rights acquired by virtue of acts done in conformity with one tenable executive construction of a statute to be defeated by a subsequent change of office practice. In

the case of *James v. Germania Iron Co.* (*107 Fed. R., 597*), Judge Sanborn, delivering the opinion of the Circuit Court of Appeals, said:

> "The land department of the United States is a *quasi* judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the land department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another; or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect."

After discussing the facts established in the case before him, he continued:

> "The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land and the rules and practice of the department on that day, and no subsequent rules, decisions, or practice could divest them of the prop-

erty they then secured, or deprive them of their equitable or legal right to the title to the land which they then acquired. For this reason the subsequent practice and decisions of the department which have been carefully considered will not be reviewed at length in this opinion, but will be here laid aside with the remark that they are without legal effect upon the issues in this case, and their examination has proved futile and profitless."

In the case of *U. S. v. Alabama, &c., R. R. Co., 142 U. S., 615, 621,* there was drawn in question the validity of the construction placed upon a statute by the Post-Office Department, which was charged with its execution. Mr. Justice Brown, delivering the opinion of the court, said:

"We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years through six differrent administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. *It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government.* These principles were announced as early as 1827, in Edwards' Lessee *v.* Darby, 12 Wheat., 206, 210, and have been steadily adhered to in subsequent decisions. United States *v.* State Bank of North Carolina, 6

Peters, 29, 39; United States *v.* McDaniel, 7 Peters, 1." * * *

U. S. v. Moore, 95 U. S., 760.
Brown v. U. S., 113 U. S., 568, 570, 571.
Iowa v. McFarland, Commissioner (5 % cases), 110 U. S., 471, 484, 485.
Hewitt v. Schultz, 180 U. S., 139.
Moore v. Cormode, Id., 167.

In 1882, two years after Prosser entered the Government service as special timber agent and several months before he filed his entry upon the land in dispute, the Commissioner of the General Land Office, when called upon to pass upon his right to receive a patent for land covered by his pre-emption entry, instructed the register and receiver of the local office as follows:

> *"It is held by this office that the case of Mr. Prosser does not come within the inhibition contained in section 452, Revised Statutes, and that a special timber agent may be entitled to the pre-emption privilege, not being employed in the General Land Office at Washington. The circular of August 23, 1876, issued by this office, under the honorable Secretary's decision of August 3, 1876 (3 Copp's Land Owner, 122), forbids the entry of public land by clerks and employees in the local land offices, but does not apply to special agents."*

The circular of August 23, 1876, referred to, was directed by the commissioner to registers and receivers of local offices. It was designed to extend the prohibition of the statute to persons employed in local offices as well as in the General Land Office in Washington, it reads (p. 15):

> "Pursuant to instructions from the honorable Secretary of the Interior of the 3rd inst., you are hereby advised that the *registers and receivers, and their clerks and employees, and those intimately and confidentially related to the registers and receivers, their clerks and employees,* will not be permitted, under any circumstances, to make entries of public lands

> at the district offices over which they respectively have control, or in which they are respectively employed; and that upon satisfactory proof that this regulation has been violated, the officer offending will be reported to the Executive for removal."

We have seen that a special timber agent has no control over or part in the surveying or sale of land or any other branch of the regular business of a local land office, and he can not be said to be intimately or confidentially related to any officer, clerk, or employee of such office. His employment does not tend to give him information about lands available for timber-culture entries. It had never been held that a special timber agent could not make a timber culture entry or an entry of any sort, until the Secretary so decided in the present case.

The only decision of the Land Department announced prior to 1882, in which section 452 of the Revised Statute was drawn in question, was *State of Nebraska v. Dorrington, (supra)* where it was held that a *clerk in a local land office* ought not to be permitted to enter land in his district, although not expressly prohibited by law from so doing (*2 Copp's L. L., 647*).

Here we find nothing applicable to special timber agents, or anything in conflict with the commissioner's decision in Prosser's pre-emption case. Subsequent to Prosser's timber-culture entry, and up to 1885, when his term of office expired, we find but one decision of the Land Department involving the interpretation of section 452, R. S. That was *Grandy v. Bedell (supra)*, decided in 1883. The question there was whether a clerk to the receiver of a local office was within the prohibition contained in the statute. Secretary Teller said (2 L. D., 314):

> "It will be observed that the section quoted, and this is the only statutory provision bearing on the subject, does not extend to clerks in the district offices, but by its terms is confined to those employed in the

General Land Office. *Your (Commissioner's) office has, however, by rule, extended the operation of this statute so as to include clerks in the local offices;* and this Department held in the case of the State of Nebraska *v.* Dorrington (2 Copp's L. L., 647), the defendant being at the time of making his timber-culture entry *a clerk in a local land office,* that such fact was sufficient ground for the cancellation of the entry.

"But in the case now under consideration the entry was allowed November 8, 1875, and since that time the claimant has apparently in good faith observed the requirements of the timber-culture law so far as within his power. At the time of the contest the claimant was not an employee of the district office. Taking these facts into consideration, and the further one that he was not by express provision of law incompetent to make the entry, I am of the opinion that it should be permitted to stand. Under the existing regulations of your office the entry should not have been allowed in the first instance, but inasmuch as it was, to insist on its cancellation after so many years' compliance with the law would seem to be giving undue importance to the rule forbidding such entry."

Subsequent to 1885, when Prosser left government employ, we find in the land decisions a number of cases in which the above act was discussed, but no decision or circular of instructions in which it was said that a special timber agent was forbidden to enter public land. The *Lock Lode* case (*supra*), decided in 1887, (*6 L. D., 105*), grew out of an entry on mineral land, made by a deputy mineral surveyor, the land being located in the mining district where he was employed. The commissioner held his entry for cancellation, but on appeal this was reversed by the Secretary. After reviewing the laws pertaining to the exploration and purchase of mineral lands, the Secretary said:

"There is nothing in the statute (sec. 452, R. S.) preventing such entries, and, so far as I can ascertain,

there has been nothing in any of the regulations of the Department to prevent their being made.

"It is true the deputy surveyor is in one sense an officer of the United States in the mining district for which he is appointed. Now, it has been uniformly held by the Department that registers and receivers and their clerks cannot be allowed to make entries of public land in their respective land districts, except as provided in section 2287 of the U. S. Revised Statutes, the reason being that they will be called to pass upon their own proofs, and are always in a much better position to ascertain the status of desirable tracts of land than outside parties. This is a wise and just rule, based upon sound principles of public policy.

"But it has also been ruled that a register, receiver, or clerk in a local land office may make a timber-culture entry in a district other than the one in which he is located, for there the reasons assigned for refusing the entry in their own districts do not exist. Instructions August 28, 1883 (2 L. D., 313). * * *

"It would seem that there can be no valid objection to this entry as a matter of public policy, unless it be said that claimant's position as a deputy surveyor gives him an advantage over the rest of the community in locating claims—in other words, his position gives him special information as regards the places where valuable minerals are to be found. I am not of the opinion, however, that this objection should be sufficient to work a forfeiture of an entry already made, or to prevent the making of one. In all such cases, though, the claimant should show his good faith beyond any question of doubt; and it would not be improper, I think, to examine such cases with particular care and scrutiny to ascertain clearly that no provision of law or regulation of the Department has been violated."

The case of *McMicken* (*10 L. D., 97, supra*) was decided by Secretary Noble in 1890, several months after the contest of Prosser's entry was instituted and over seven years after the entry was filed. At the time of making his entry McMicken was a clerk in the office of a surveyor general. The commis-

sioner held that he was disqualified and ordered the cancellation of his entry. On appeal this was affirmed by the secretary, who said in effect that the disqualification to enter public land contained in section 452, R. S. U. S., extended to all officers, clerks, and employees in the two leading subdivisions of the General Land Office, namely, the one charged with the *sale* and the one charged with the *survey* of public lands, hence McMicken's entry was illegal and must be canceled. McMicken moved for a review, but it was denied (*11 L. D., 96*).

This decision, it will be observed, is in conformity with the act of 1836 as extended by the Department's circular of 1876 (*supra*). It was not held that the disqualification extended to special timber agents or any subordinates of the commissioner having duties other than those relating to the surveying and sale of public lands.

In *Leffingwell's case* (*30 L. D., 139*), decided in 1900, it appeared that the applicant was a deputy mineral surveyor, and that he had surveyed the claims covered by his entry, but at the time of the survey had no interest in land. The commissioner held his entry for cancellation, ruling that he was disqualified to enter the land by section 452 of the Revised Statutes. In his opinion the Secretary referred to the statute and the Land Department's circular of September 15, 1890, issued after the decision of the McMicken case, which read:

> "All officers, clerks and employees in the offices of the surveyor general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office are, during such employment, prohibited from entering, or becoming interested, directly or indirectly, in any of the public lands of the United States."

Continuing, the Secretary said:

> "Without at the present time considering the correctness of the conclusion arrived at in the case of

Floyd *et al. v.* Montgomery *et al.* (26 L. D., 122, 136) and similar cases, in so far as it was therein held that the prohibitive provisions of said section embrace a deputy mineral surveyor, it is sufficient to say that the facts in this case, as disclosed by the record, are materially different from those stated in the cases referred to.

"Independently of the statute, it would be within the power of the Land Department in making regulations for the survey of mining claims to provide against the survey thereof by one interested in the claim, the reason therefor being manifest. In the case under consideration Leffingwell had no interest, real or contingent, in the claims involved at the date of the survey thereof by him, or at the date of the application for patent thereto, and under these circumstances it is not believed that he is within the spirit of the statute or circular above quoted."

From the foregoing review of the authorities, it is obvious that Prosser's entry when made was not forbidden by the law as construed by the Land Department or by any regulation of the Department then in force, or indeed any regulation or decision announced prior to the institution of Walker's contest.

We have seen from the authorities discussed in this and the preceding branch of the argument that the departmental rules and regulations, in conformity with which Prosser made his entry and proceeded with the planting and improvement of the land in dispute, were not contrary to any statute. We have seen that Prosser's qualification to enter public land had been passed upon by the Land Department and his right to do so upheld.

When Walker's contest was made, the question concerning Prosser's status under the law was not new. The Land Department's decisions then in force should have governed the case, subsequent executive constructions of the statute to the contrary notwithstanding.

(c) If the prohibition contained in section 452, R. S. U. S., had extended to special timber agents, it would not have rendered the plaintiff's entry void or liable to cancellation, but merely rendered plaintiff liable to removal from his office.

If the statute in question merely declared that certain officials should not enter public land, there would be ground for holding that an entry made in violation of it would be void *ab initio;* but such is not the case. After the words of prohibition the statute proceeds to define the penalty to be inflicted in case of its violation, as follows: "* * * any person who violates this section shall forthwith be removed from his office." The loss of office, then, is the full measure of penalty that can be imposed for a violation of the law. Punishment by way of cancellation of an entry or forfeiture of rights acquired in public lands cannot be inflicted. The maxim *"Expressio unius est exclusio alterius"* applies.

II.

If the plaintiff had been disqualified by law from entering public land when he made his entry upon the land in dispute, the entry would have been validated by the removal of his disability, which occurred four years before the date of the contest wherein his entry was canceled. The removal of his disability, coupled with the fact that plaintiff made his entry in good faith and in conformity with a decision of the Land Department, and for a period of seven years subsequent to his entry and prior to the contest had done and performed all things requisite for the acquisition of the land, under the land laws of the United States, would have been sufficient to cure the defect in plaintiff's entry, if it had been defective originally.

Prosser's entire good faith in making his entry, upon the assurance of the Commissioner that he was not prohibited

from so doing, and his subsequent compliance with the timber-culture laws, is clear. He held and cultivated the land for seven years, during the last four of which he was not in Government employ and was under no possible disability. These facts were recognized by the various officials of the land office who passed upon the case, and they commented upon the hardship which resulted from the cancellation of his entry.

In similar cases the land office has held consistently that where some disability of an entryman was discovered subsequent to his entry or where some default on his part has rendered the entry liable to cancellation, such disability or default may be cured, before the intervention of any adverse rights, and where in other respects good faith and compliance with the land laws is shown. In addition to the case of *Grandy v. Bedell* (*supra*), where the entryman was a receiver's clerk in a local land office and where many years' compliance with the law subsequent to his quitting that employment was held to cure his original disability, there are many cases where it has been held that the disability of an entryman may be cured. In these the disability consisted of alienage, infancy, or other disqualification existing at the time of entry.

Mann v. Huk (*3 L. D., 452*) is a case frequently cited and followed by the Land Department. In March, 1883, Huk, an alien, believing himself to be a citizen of the United States, filed a declaratory pre-emption statement and made settlement on the land in question. In June of the same year he learned that he had not acquired citizenship, and straightway made declaration of intention to become a citizen. Subsequently the defendant Mann made a homestead entry on the same tract and filed a protest against the acceptance of Huk's final proof, on the ground of his alienage at the time of entering upon the land. Secretary Lamar, in deciding the case, said:

> *"It is a settled ruling of this Department that where a defect of this sort exists it may be cured by*

fulfilling the requirements of law at any time prior to the intervention of an adverse claim, and otherwise showing good faith. As Huk made his declaration of intention June 2, 1883, two months before the entry of Mann, on July 30, 1883, the defect in his case was thereby cured as between him and the Government, the only party then in interest, and he was at the date of Mann's entry a qualified pre-emptor."

Apply this wise and equitable rule to the case at bar and we see that when Prosser left Government employ, in 1885, four years before the filing of Walker's contest, his alleged disability ceased as between him and the Government, which was then, and for the space of four years thereafter continued to be, the only other party in interest.

Another pertinent authority on this point is the case of *Krogstad* (*4 L. D., 564*). In April, 1878, Krogstad, an alien, made a homestead entry on land in Dakota. Some months later he made declaration of intention to become a citizen of the United States. In March of 1883 he was allowed to purchase the land and a cash certificate was issued to him, but after that he was advised by the Commissioner of the General Land Office that, unless he could show that he had declared his intention to become a citizen prior to the date of his homestead entry, his certificate would be declared illegal and canceled. Krogstad then furnished an affidavit stating that at the time of his entry he believed himself to be a citizen, owing to the fact that his father had filed a declaration of intention to become a citizen while he (Krogstad) was still a minor. The case finally came before the Secretary, who said:

"In his original homestead affidavit, claimant alleges that he is a citizen of the United States, and the papers are in all other respects regular and the entry *prima facie* valid. There is no other claim for the land, and the right of Krogstad to the land was not questioned until cash certificate was presented to your office as a basis for patent. The question arises as to

the effect of the declaration to become a citizen upon the claim of Krogstad to the land, and for the purposes of this inquiry such declaration serves all the purposes of a full naturalization. * * *

"In the case of Osterman *v.* Baldwin (6 Wallace, 116), Baldwin, a citizen of New York, purchased and paid for three lots in Galveston, in the then Republic of Texas, receiving certificates of purchase for the same. The constitution of Texas, however, prohibiting aliens from holding lands there, he transferred said certificates to one Holman, a Texan, as trustee. Texas was admitted into the Union in 1845. In an action thereafter brought by Baldwin to try the title to said lands, the defendants set up Baldwin's alienage and consequent incapacity to hold. The court ruled that, 'Even if the defendants could have made this objection while the Republic of Texas existed, they cannot make it *now*, because when Texas was admitted into the Union the alienage of Baldwin was determined. His present status is that of a person naturalized, and that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of his former title.'

"Section 2319 of the Revised Statutes provides that 'all valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such,' etc. The court in construing said section holds that 'upon declaring his intention to become a citizen an alien may have advantage of work previously done and of a record previously made by him in locating a mining claim on the public mineral lands. Crœsus Co. *v.* Colorado Co. (19 Fed. Rep., 78).

"After an examination of the above cases and the authorities therein referred to, I am of opinion that the homestead entry of claimant was not void, and there being no adverse claim, that his alienage cannot now be pleaded against him. Said decision holding his cash entry for cancellation 'for non-compliance with the naturalization laws of the United States' is therefore reversed."

In the case of *Jacob A. Edens* (*7 L. D., 229*), where the facts were similar to those of the above-quoted case, the Secretary of the Interior said:

> "Without deciding whether proof made by an alien will be accepted, there is no doubt, under the rulings in the cases of Ole O. Krogstad (4 L. D., 564), Mann *v.* Huk (3 L. D., 452), and Kelly *v.* Quast (2 L. D., 627), that the defect of alienage was cured when the claimant became a citizen in March, 1886, and, in the absence of any adverse claim, his right to the land relates back to the date of his settlement, notwithstanding the fact that he was an alien when it was made."

See also

Paulus v. Kundert (*7 L. D., 362*).
Lyman v. Elling (*10 L. D., 474*).
Kirkpatrick v. Brinkman (*11 L. D., 71*).

Phillip v. Sero (*14 L. D., 568*)—In 1877 Sero made an homestead entry on land in Oregon, and in 1882 submitted final proof and received his final certificate. He had not then become a citizen of the United States, nor declared his intention of doing so, and was not naturalized until the year 1884. Subsequently he sold the land to Philip, who in 1890, on learning of the supposed defect in his title by reason of Sero's alienage, filed a contest against the original entry, alleging that it was fraudulent and in violation of the homestead laws. This contest was finally disposed of by the Secretary of the Interior, who said:

> "While his proof was made when he was an alien, yet the defect of alienage was cured by his becoming a citizen before any adverse claim or contest was initiated, and in such cases the Department has ruled that the right of the claimant relates back to the date of his settlement."

See also—

Kelly v. Quast, 2 L. D., 627.
St. Paul, etc., R. R. v. Forseth, 3 L. D., 446.
Pfaff v. Williams et al., 4 L. D., 455.
Hollants v. Sullivan, 5 L. D., 115.
Central Pac. R. R. Co. v. Painter, 6 L. D., 485.
Lord v. Perrin, 8 L. D., 536.
Leary v. Manuel, 12 L. D., 345.

The case of *Bright* (*6 L. D., 602*) involved the question of disability in consequence of infancy, and the Secretary of the Interior said:

> "Minors, not heads of families, are not qualified pre-emptors under section 2259, Revised Statutes; and the filing made by the claimant in this case, having been made when he was laboring under the disability of infancy, was illegal. Was this illegality cured by claimant's attaining his majority before any adverse claim had attached? In the case of Kelly *v.* Quast (2 L. D., 627), Mann *v.* Huk (3 L. D., 453), and Ole O. Krogstad (4 L. D., 564) the pre-emptor at the time of filing the declaratory statement was not a qualified pre-emptor because at the time of filing he was an alien; but in each of said cases the disability of alienage was cured by the filing of a declaration of his intention to become a citizen of the United States before any adverse claim had attached, and such claims were allowed to stand subject to future compliance with the law. I think these cases are analogous to the case at bar; and while the filing in this case was illegal in its inception, on account of the minority of the attempted pre-emptor, *this disability was cured by his attaining his majority prior to exercising the right to transmute the land* held under his pre-emption filing to a homestead entry, a right only allowed to those having a valid pre-emption filing."

St. Paul, etc., R. R. Co. v. Forseth (*3 L. D., 446*) is a case involving the validity of a homestead entry made in behalf of the entryman by an agent. The entry was attacked by the railroad company on the ground that it had been made through an agent, while the entryman, as shown by his affidavit, was a single man, in the naval service of the United States, and therefore disqualified from making entry in that manner. The case came before the Secretary of the Interior on appeal. It was said:

> "Under the homestead laws all applications to make entry are required to be accompanied by duly ex-

ecuted affidavits showing the qualifications of the party to make such entry. This requirement is made in order to show the good faith of the applicant, and is a matter, under the law, between him and the Government. If satisfied with the showing, the application is allowed to be recorded; if not, it is rejected. If accepted on what may be thought an unsatisfactory showing of the necessary qualifications, or on a defective affidavit, either in form or substance, the entry is suspended and the party called upon to comply fully with the requirements of the Department. But such entry, if accepted, is not, because of the defective affidavit, absolutely null and void. It is an entry which may be perfected so that the party can obtain a patent for the land covered by it; or it may be avoided, because of defects, by the Government, either with or without contest. But, having been accepted and recorded, until avoided, it is an entry, and as such segregates the tract from the public domain, precluding the claim of any one else to the land covered by it.

"Had the local officers declined to receive the application their action would have been sustained. But in the absence of such action the entry remained intact upon the records, with the privilege to the entryman to cure the defect.

"This is the every-day practice of your office; and under it many thousands of entries have been approved for patent. Were that practice to be now declared improper and it be held that such defects in entries could not be cured, because the latter were rendered thereby absolutely null and void, the result would be far reaching and disastrous, unsettling the title to many millions of acres of the public lands.

The case of *Baird* (*2 L. D., 817*) was one involving a reported timber trespass by a "squatter" on unsurveyed Government land. In reviewing the report of the trespass the Secretary of the Interior, in a letter to the Commissioner, wrote as follows:

"While Baird is a squatter, he is rightfully on the land if he *intends to make his home on it, and take it*

under the settlement laws when the land is surveyed, and he is allowed to do so.

"If he has taken the land in good faith he is the owner thereof for all practicable purposes, although the title may remain in the Government.

"If it appears that he has cut more timber than he was compelled to cut to clear up the land, he is not liable, either criminally or civilly, for so doing, if all the time he has the honest purpose of ultimately completing his title under the laws of the United States."

In a general letter of instructions, directed to the Commissioner in 1895 (21 L. D., 67), Secretary Smith said:

"I am in receipt of your office letter of April 3d last, inviting attention to the definition of the word 'timber' as given in departmental decision of March 21, 1894, in the case of Gibson *v.* Smith (18 L. D., 249), and recommending that your office be instructed to hold intact all entries made prior to March 21, 1894, under the act of June 3, 1878, where such entries are free from all defects except their failure to come within the said definition of the word 'timber.'

"Your said office letter gives as a reason for the recommendation as above quoted, that many entries under said act have been made for lands the timber on which was only suitable for fire-wood; that in certain localities the scarcity of fuel and the mountainous and sterile character of the lands so entered render them chiefly valuable for the timber growing upon them, although its only utility is for fire-wood. It is further stated, that to follow the departmental decision herein referred to and cancel these entries will involve repayment to the purchasers of the price paid for the lands, and in many cases would work great hardship and injustice to the entrymen.

"Whilst I am not in doubt as to the correctness of the construction placed upon the law in the case of Gibson *v.* Smith, *supra,* I am strongly impressed with the view that entries made in good faith, the money paid for the land, and receipt therefor given prior to the date of the decision above mentioned, to

> wit, March 21, 1894, such entries having been made of lands theretofore treated as timber lands within the meaning of the law by your office and the local offices, should be allowed to stand, if no objection exists other than that as to the character of the growth upon said lands. Such action will protect rights which in a sense became vested under the law as then administered, and is in line with precedent. See case of *James Spencer, 6 L. D., 217.*"

These different cases, we submit, demonstrate clearly the Department's policy of consideration for the equities of those whose claims to public land, through no fault of theirs, have been or become invalid as against the United States. It is uniformly the case that, where no adverse rights are infringed by such a decision, the Department will forebear to enforce its regulations rigidly, and, where good faith and diligence are evident, will allow those entering public land to cure any technical fault of which they may have been guilty.

In the last decision whereby Prosser's entry was canceled (pp. 14-17), the Secretary completely ignored the removal of Prosser's disability before the intervention of an adverse claim, notwithstanding that his predecessors, and even he, had consistently held that similar disabilities might be cured. In like manner the court below neglected to give weight to, or even consider, that question (pp. 22-24). This, we submit, was contrary to precedent and was error.

III.

The defendant entered upon the land in dispute with full notice of all proceedings had with respect to the entry theretofore made thereon by the plaintiff, and of the plaintiff's work done and expenditures made in and about the cultivation and improvement of the land, and, therefore the defendant having obtained legal title to same by patent from the United States, in consequence of errors of law commited by the Land Department in cancelling plaintiff's entry, should be decreed to hold the title for the benefit of the plaintiff.

The court below appears to have attached importance to the fact that the defendant Finn was not a party to the contest wherein Prosser's entry was canceled and the fact that Prosser had no legal title to the land when Finn's entry was filed. It is positively stated in the complaint that when Finn made his entry he had knowledge of Prosser's entry and the improvements that he had put upon the land, trebling its value, and knew that Prosser's entry had been canceled solely because the Department considered special timber agents to be within the prohibition of the statute. In its opinion the court below said (p. 24) that no reason was shown by the complaint why Finn should be held a trustee of the title for the benefit of Prosser. We submit that this was error. It matters not that Prosser had no legal title to the land when Finn made his entry. Under the land law legal title is only acquired through the issuance of patent, but prior to patent equitable rights accrue to the holder of the land under a lawful entry, which the courts will secure to him even though the Land Department may have held his entry to be void. It matters not that Finn was not the one instrumental in securing the cancellation of Prosser's entry. He had full knowledge of the proceedings under Walker's contest. The question at issue is: Did the Land

Department, by an erroneous interpretation of the law, deprive Prosser of equitable rights having priority over the title which the defendant Finn acquired, by virtue of his entry or his patent? Such being the case, Prosser was surely entitled to the relief prayed by his complaint. Finn cannot claim to be a *bona fide* purchaser, even if that would justify the court in awarding to him what had been wrongfully taken from Prosser. There are many authorities on this point, which with uniformity support our contention. We make reference to but five decisions:

Silver v. Ladd (*7 Wall., 219*) was a suit in chancery in the courts of Oregon, wherein the plaintiff claimed the right to land under the act of Congress of September 27, 1850, commonly known as the Donation Law. The plaintiff derived his right from one Elizabeth Thomas, a widow, to whom the register and receiver of the proper land office had issued a donation certificate pursuant to the provisions of that act. This certificate was set aside by the commissioner on the ground that Elizabeth Thomas was not the head of a family. On appeal to the secretary, the action of the commissioner was affirmed on the ground that she was not a settler on the land. The Supreme Court of Oregon, whose judgment this court reviewed, held the certificate void because she was not such a person as could take land under the act, being an unmarried female. The court said, per Miller, J.:

> "If, for any of these reasons, the action of the Commissioner can be sustained, then the judgment of the Supreme Court of Oregon dismissing plaintiff's bill must be affirmed. If it cannot, then the patents issued to the defendants after the certificate of Elizabeth Thomas was wrongfully set aside, must inure to the benefit of plaintiff, representing her equitable title. (Lindsey *v.* Hawes, 2 Black, 554; Garland *v.* Wynn, 20 How., 8; Minnesota *v.* Bachelder, 1 Wall., 109)."

After showing that Mrs. Thomas was qualified to acquire land under the statute, and that the commissioner had erred

in setting aside her certificate and the State Court in dismissing the plaintiff's bill, the opinion continues:

> "The certificate of Mrs. Thomas was, therefore, properly issued by the register and receiver, and conferred upon her the equitable right to the land in controversy, and the decree of the Supreme Court of Oregon must be reversed.
>
> "But the language of the prayer of this bill for relief, and some remarks in the brief of counsel, call for comment on the proper decree to be rendered on the return of the case to that court.
>
> "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title, which has passed from the United States to the defendant, inured in equity to the benefit of plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways (Jackson *v.* Lawton, 10 Johns., 24; Boggs *v.* Mining Co., 14 Cal., 363, 364). The most usual mode under the chancery practice, unaffected by statute, is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose. In some of the States it is provided by statute that a decree of the court shall operate as a conveyance where it is so expressed in the decree, and additional relief may be granted by giving possession of the land to plaintiff, quieting his title as against defendants, and enjoining them from asserting theirs."

Stark v. Starr et al. (6 Wall., 402-419): This was a suit to quiet title to certain land in Portland, Oregon. The complainants claimed title under patents granted by the United States. The defendant had received from the Government another patent for the same land, which was issued one day after that of the complainants. The circuit court held the

defendant's patent void as against the complainants and gave judgment for the latter. That judgment was affirmed by the Supreme Court of the State. On writ of error, this court held that the complainants' patent had been granted in consequence of errors of law committed by the Land Department and adjudged the defendant to be the owner of the land. After a review of earlier cases, it was said:

> "These are only applications of the well-established doctrine, that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. The same observation will apply to the other cases cited by counsel. They have no pertinency to the case at bar, for here no prior or better right to the land in dispute is shown in the plaintiff."

In the case of *Cornelius v. Kessel* (*128 U. S., 461*) the court said:

> "If from inadvertence or mistake as to their rights, or other cause, they (the United States) afterwards conveyed that title to another, *the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title* (*Lindsay v. Hawes, 2 Black, 554; Stark v. Starr, 6 Wall., 402, 419*)."

Bernier v. Bernier (*147 U. S., 242*): This was a suit in equity to determine the respective rights of the heirs of Edward Bernier to certain land held by him under a homestead entry at the time of his death. It appeared that the decedent left him surviving ten children, but five of whom were then of age. Some months after Bernier's death, one of the adult heirs, acting in behalf of all heirs, made the necessary proof for commuting the homestead entry, paid the minimum price for the land, and received a certificate entitling him to a patent. This certificate was never canceled; nevertheless a second certificate was issued to the minor

heirs, and thereupon patent was issued to them. The adult heirs then filed their bill, showing that the patent was issued by mistake and should have been made out in favor of all of the heirs jointly. They prayed that the defendants be decreed to hold the title in trust for all. The court said:

> "We are of opinion, therefore, that the right to the premises in controversy, covered by the homestead entry, vested in all the heirs of Edward Bernier at his death, the adult as well as the minor heirs, and that the subsequent patent issued to the latter should have been issued to them all jointly, or a separate patent should have been issued for an undivided tenth to each heir. The minor heirs holding under the patent issued, and the defendant Goff, who received a quit-claim for an interest from one of them, should, therefore, be required to execute proper conveyances to the complainants, so as to transfer to them an undivided half interest in the whole, or to each complainant an undivided tenth interest in such lands. *This is in conformity with the well-settled law that where a patent for land is issued by mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him.*"

Re Emblen (*161 U. S., 52*), decided by this court in 1896, is directly in point. It was held that when the Land Department, through an error of law, has rejected the application of one party claiming equitable rights in land by virtue of an entry made and subsequent proceedings had in conformity with law, and thereafter a patent is granted to another party, the first entryman can obtain no redress in the Land Department or otherwise than by a bill in equity, and that he may maintain a bill to have the patentee decreed to hold title in trust for him.

We submit that the judgment in error should be reversed.

JAMES H. HAYDEN,
ROBERT C. HAYDEN,
JAS. B. REAVIS,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
OCT 26 1907
JAMES H. McKENNEY,
CLERK.

In the Supreme Court

of the

United States

WILLIAM F. PROSSER, *Plaintiff in Error,*

v.

GEORGE L. FINN, *Defendant in Error.*

No. 64.

BRIEF FOR DEFENDANT IN ERROR

B. S. GROSSCUP,
Attorney for Defendant in Error.

THE BELL PRESS, 717 Commerce St., Tacoma.

In the Supreme Court
of the
United States

WILLIAM F. PROSSER, *Plaintiff in Error,*
v.
GEORGE L. FINN, *Defendant in Error.*
} No.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE.

This case was initiated by plaintiff William F. Prosser in the Superior Court of the State of Washington, by the filing of a complaint in which it was stated, in substance, that in October, 1882, Prosser made a Timber Culture filing covering public lands of the United States particularly described as Lots one (1), two (2), five (5), eight (8) and ten (10), Section two (2), Township eight (8) North, Range twenty-four (24) East, Willamette Meridian; that Prosser thereafter continued to plant and cultivate trees, and was endeavoring and intending in all respects to comply with the Timber Cul-

ture Law, until his entry was cancelled July 7th, 1893, by the Secretary of the Interior, as the result of a contest filed by John A. Walker.

At the time of making his entry, plaintiff Prosser was a Timber Inspector, acting under the direction of the Commissioner of the General Land Office. The entry was cancelled because a statute of the United States provides that "the officers, clerks and employes in the General Land Office are prohibited from directly or indirectly purchasing, or becoming interested in the purchase of, any public land."

Revised Statutes of the United States, Section 452.

"While plaintiff had continued to plant trees and to cultivate and improve said entry in good faith, and in compliance with the law," the affidavit of contest was filed. It is not alleged in the complaint that, as an entryman, he had completed everything required of him by the terms of the Timber Culture statute.

18 Statutes at Large, p. 21.

The complaint does not say what became of Walker after he succeeded in procuring the cancellation of Prosser's entry by order of the Secretary of the Interior. It is alleged "that thereafter the said defendant in this cause was, in pursuance of said erroneous decision, permitted to enter said lands, he having full knowledge of plaintiff's rights and equities therein, and thereafter, to-wit: on the ——— day of ————, a patent was duly issued by the United States to him, which patent is now on record." No relation between defendant Finn and

contestant Walker is alleged. As a result of the proceedings in the Interior Department, on Walker's contest, Prosser's entry was cancelled and the land restored to the public domain, whereupon Finn, a stranger to that proceeding, availed himself of the law relating to sale of the public lands, and acquired title from the United States.

Upon this statement of facts as a cause of action, the Superior Court of Washington sustained a demurrer. The Supreme Court of the State affirmed that judgment. The writ of error on which the cause comes into this court seeks a reversal of the judgment in the State court, and a ruling to the effect that the defendant Finn shall be required to convey to the plaintiff Prosser title to the land.

ARGUMENT.

The plaintiff Prosser was "prohibited from directly or indirectly purchasing, or becoming interested in the purchase of, any public land."

Revised Statutes of the United States, Section 452.

The grantee of public land by patent from the United States, under the general land laws, takes title by purchase.

United States v. Waddell et al. 112 United States, 76, 80.

That the land in litigation was public land at the time of Prosser's entry and during the period of his cultivation of trees thereon, appears from the complaint.

It also appears that the entryman, at the time of his entry, and subsequently, was an employe of the General Land Office. The prohibition of the statute is against both the direct purchase of public land, and the acquisition of public land by any indirect method. The plaintiff's filing and attempt to acquire rights under that filing, was an attempt to purchase from the Government by a direct method. The Interior Department held that this could not be accomplished. Plaintiff's attempt to acquire the title granted by the Government to the defendant Finn by means of a judicial decree, is an attempt to acquire the land by an indirect method, also expressly forbidden by the statute. From any view of the case, we are at a loss to find a ground on which the plaintiff can stand.

Plaintiff, in paragraph 5 of his complaint (Record, p. 3), attempts to state a case in the nature of an estoppel. In the Supreme Court of Washington his counsel's argument was based almost entirely upon that ground. The allegation relied upon is as follows:

"The plaintiff, resting on the construction of the law by the Interior Department at the time of the initiation of his said entry, and the special advice of the Honorable Commissioner of the General Land Office, made his filing in good faith for said entry, and pursuant thereto in good faith diligently planted trees, and cultivated said lands so described, and at great expense in labor and money, was capable and was intending to in all respects fully comply with the Timber Culture Law and perfect title to said lands."

Plaintiff's position has no foundation either in law or fact.

The executive department of the government, acting through the officers of the Interior Department, can not, by their rulings, nullify an act of the Congress. The legislative power of the government can not be transferred to the Interior Department in the guise of construction. If the meaning of a legislative act is doubtful, it is the function of the courts to construe the act. In determining the legislative intent, where the language of an act is ambiguous the courts will consider contemporaneous and immediately subsequent departmental rulings, for the reason that legislation of this kind usually originates with the department, and its officers are in a position to know the purpose of Congress. The departmental construction of an act of doubtful meaning, acquiesced in for a long time, will be considered in arriving at the legislative intent, because it may be fairly assumed that if the construction given the act by the department be erroneous, the Congress will correct the error. We are not aware of any decision which permits the department to set aside an act of Congress certain and definite in its terms.

The position of the plaintiff that he was misled to his prejudice by the officers of the Interior Department, is not justified by facts. The decisions of the Interior Department are collated in the opinion of the Hon. Hoke Smith, who, as secretary, wrote the final opinion in this case in that department. (Record, pp. 14-17.)

The statute prohibiting employes of the General Land Office from entering public land has been in effect since

1836. In *Nebraska v. Dorrington et al.*, 13 Copp's Land Owner, 122, Secretary Chandler said:

"Registers and receivers and their clerks and employes and all persons intimately or confidentially connected with such officers or employes, are prohibited from making entries of the public lands at the office at which they are connected."

Under date of August 25th, 1876, the Commissioner of the General Land Office published a circular notifying all employes of his office that they will not be permitted, under any circumstances, to make entries of public lands at the district offices in which they are in any way employed.

In *Grandy v. Bidell*, 2 Land Decisions, 314, the department ruled that the prohibition was not applicable to a clerk in the local Land Office at the date of making entry. This decision was contrary to all prior holdings, and was subsequently disregarded by Secretary Noble in the case of *Herbert McMicken*, 10 Land Decisions, 97, where the Secretary holds that Section 452 of the revised statutes extends to officers, clerks and employes in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office. This decision became the basis for a circular issued by the department in 1890. This circular is sweeping in its terms, and prohibits the entry of public lands by any person under the supervision of the Commissioner of the General Land Office.

The ruling of Secretary Noble in *Williams v. Seidler*, 15 Land Decisions, 266, on review, is in harmony with

the previous holdings of the department, but permits the consummation of a title by an employe where the entry was made and partial requirements of the statute performed, prior to the entryman's appointment to his office.

A review of the decisions of the department shows that, with one solitary exception, the executive officers have adhered to the plain, mandatory provisions of the statute, and in the excepted case above referred to an attempt was made to excuse the erroneous ruling on the ground that the application of the law to that particular case would work a hardship. Secretary Smith pertinently says:

"The object of the statute, in disqualifying the employes of the General Land Office, was to prevent their use of such knowledge as came to them in an official way, to their private benefit; hence it follows that an entry made prior to the time of becoming connected with the office, should stand, for the reason that he did not have, and could not have had, any superior sources of information over his neighbors, and it would be a manifest injustice to destroy the rights of a *bona fide* entryman of the public lands on the ground that subsequently he became an officer or agent of the government in relation to the public lands."

Record, p. 16.

It appears from the exhibits attached to the complaint that plaintiff Prosser was permitted by the department to complete, after his appointment in the service, a pre-emption filing on public land not involved in this suit, initiated prior to his appointment as a special agent. The Commissioner's letter permitting the com-

pletion of this entry, gives an erroneous reason for the rule adopted in that particular case; but certainly the laws of the country can not be frittered into mere empty words by an erroneous reason given to Mr. Prosser for permitting him to exercise a doubtful right. The erroneous reasoning in this single decision does not justify the allegation in the complaint to the effect that the department had for a long time, by construction, excepted special agents from the operation of the statute.

But if the Court shall disregard the statute or hold it inapplicable to special agents, the plaintiff has not alleged a title in himself sufficient to justify the relief sought. Giving to the complaint its strongest interpretation, the most that can be said is that the plaintiff was prevented from perfecting rights initiated under the Timber Culture Act. He had not acquired any such equitable title to the land as entitles him to a patent.

18 Statutes at Large, p. 21.

The decisions of this Court requiring the conveyance of the legal title of the patentee from the government to the equitable owner, who has fully performed his contract with the government and is consequently entitled to the patent, are not applicable to this case. It is not alleged that the plaintiff Prosser had performed every act required of him to entitle him to a patent from the government. His allegation is that he was intending to perform every act, and was prevented from so doing by the cancellation of his entry during the period of performance. To give him a legal title by operation of a judgment of the kind sought in this proceeding

would amount to giving him, through the judiciary department, more than he shows himself entitled to have received through the executive department. He should not be awarded the benefit of the patent issued to the defendant Finn until he has made a showing that he is entitled to a patent, and that the government, through error, has issued the patent to the wrong party.

It has been suggested in the argument of this case in the State courts that a holding in conformity to this argument would result in a loss to the plaintiff, for which he would have no remedy. That may be true, but a judgment conforming to the relief sought by the plaintiff would result in depriving the defendant Finn of the benefit of his labor and improvement in the acquisition of this land under the public land laws of the United States, without any remedy for the loss which such a decision would inflict. The defendant had nothing to do with the cancellation of plaintiff's entry. He had nothing to do with any of the acts on part of executive officers of the government, which resulted in depriving the plaintiff of his right to acquire this land. The defendant Finn found a piece of unoccupied land, appearing upon the record books of the government as public land open to entry. An examination of the register's books showed that the plaintiff Prosser had been held disqualified to acquire title to the land, and was without remedy to require the government to permit him to fully perform the acts required by the statute, precedent to the issuance of a patent. Plaintiff must have abandoned his possession, otherwise the defendant Finn could not

have made and perfected his entry and caused the same to ripen into a patent.

I respectfully submit that the judgment of the Supreme Court of Washington should be affirmed.

B. S. GROSSCUP,
Attorney for Defendant in Error.

Office Supreme Court, U. S.
FILED.
NOV 6 1907
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 64.

WILLIAM F. PROSSER, PLAINTIFF IN ERROR,

vs.

GEORGE L. FINN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff had acquired such an interest in the land as entitled him to the relief sought.

Defendant in error contends (Brief, pp. 10, 11) that Prosser had no rights in or to the land in dispute cognizable by a court of equity, because he had been prosecuting the work of planting and protecting timber on said land for *seven* years only, whereas the statute pertaining to timber culture (*act of June 14, 1878, 20 Stat. L., 113*) made it a condition precedent to the entryman's right to receive patent, that the planting and protection of timber should cover a period of *eight* years. In substance, that means that an entryman can acquire no rights which courts will recognize or protect, until he is in a position to demand the issuance of a patent conveying legal title and until the issuing of patents has become a purely ministerial act. This is not the law with respect to homestead and timber culture entries. An entryman of either of those classes, upon making his entry, acquires a right to the possession of the land covered by it. This right is effective, even against the government, so long as he continues to fulfill the requirements of the law under which his

entry was made. In the case of *United States v. Turner* (*54 Fed. Rep., 288*), the court said:

> "The homesteader has an interest in the land beyond the bare improvements placed thereon. It is true that he has not a legal title, and may never acquire it; but when he makes a *bona fide* settlement, and a valid entry of the land, he acquires an immediate interest to the entire tract, which gives him the right of possession (*Railroad Co. v. Johnson, 16 Pac. Rep., 129*). The Supreme Court of Kansas in that case said 'that the legislation of Congress with respect to the interest acquired by the homestead settler contemplates not only that he owns the improvements, *but that he has an equity in the land itself, which he may transfer for a right of way. * * *' The homestead entry gives the homesteader the exclusive right of possession, not only against individuals, but against the government.*"

Attorney General MacVeagh, in an opinion (XVII Opin., 160), said:

> "In regard to the case of a homestead settlement, the claim of a settler is initiated by an entry of the land. This is effected by making an application at the proper land office, filing the affidavit and paying the amount required by section 2290, Revised Statutes, and also paying the commission as required by section 2238, Revised Statutes. It is true a certificate of entry is not then given, the certificate being, under section 2291, Revised Statutes, withheld 'until the expiration of five years from the date of such entry,' at the end of which period, or within two years thereafter, upon proof of settlement and cultivation during that period and payment of the commissions remaining to be paid, it is issued. *But upon the entry a right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future*

> *performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership), and until forfeited by failure to perform the conditions, it must, I think, prevail not only against individuals, but against the government. That, in contemplation of the homestead law, the settler acquires by his entry an immediate interest in the land, which (for the time being, at least) thereby becomes severed from the public domain, appears from the language of section 2297, Revised Statutes, wherein it is provided that in certain contingencies 'the land so entered shall revert to the government.'"*

That an inchoate right to the land attaches immediately upon the filing of a homestead entry was forcibly stated by this court in the case of *Kansas Pacific Ry. Co. v. Dunmeyer* (*113 U. S., 629, 644*), which was a dispute between a homesteader and a railroad claiming under legislative grant:

> "Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, *by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds.*"

The foregoing authorities do not deal specifically with the rights of a timber culture entryman, but these, we submit, are in no way distinguishable from those of a homesteader. With each, the same formality of entry is required, and with each there is required cultivation and improvement of the land for a prescribed term of years before the entryman

can demand patent and acquire legal title. Hence, the equitable rights created by entries of the two classes are the same. In many cases the courts have held that timber culture entrymen are entitled to redress against trespassers.

In *Lee v. Watson* (*15 Mont., 228, 233*), the court said:

> "The plaintiff, Lee, pleads both ownership and possession. To support the former he sets forth his application to enter the land in question, under the timber culture laws of the United States, his occupancy thereof, and a receipt of the receiver of the United States land office at Bozeman, Montana. Lee's application was the only authorized filing upon the tract when this suit was instituted, and, although defendant applied to contest, leave was invariably denied him. All these facts made a *prima facie* showing of ownership and right of possession in Lee.
>
> "In Carner *v.* Chicago, etc., Ry. Co., 45 N. W. Rep., 713, it was decided by the Supreme Court of Minnesota that *rights under the timber culture act are as high as under the homestead act;* that a claimant under a timber culture entry 'has the right to occupy and cultivate the land, and owns the annual crops which the harvests, whether of grass not sown by him or of grains,' and that until a forfeiture to the United States occurred, he is the owner and has a right of redress for any injury to his property on the land. Plaintiff Lee, therefore being (as against the defendant) the legal owner, his possession, whether actual or constructive, is presumed until the contrary appears, and 'is sufficient as against mere trespassers, that is, as against those who do not show some right of possession.'"

The case of *Carner v. Ry. Co.* (*supra*) was an action of trespass. Plaintiff claimed damages for the destruction of trees and crops growing on the land described in his timber culture entry. It was held:

> "The defendant contends that, as the title to the land was in the United States, it was the owner of the

> trees, and of the grass from which the hay was made, and therefore the plaintiff cannot recover for injury to them. Plaintiff was not in wrongful possession of the land, * * *. *By his entry and compliance with the terms of the act he had acquired vested rights, even as against the United States. We held that in Red River, etc., R. Co. v. Sture, 32 Minn., 95, in respect to one entering lands under the homestead acts of Congress.*"

Comparing the effect of homestead and timber culture entries, the court said:

> "Rights under the timber culture act are as high as those under the homestead act."

Apply these principles to the present case. Prosser, the plaintiff, had filed his entry on the land in dispute in October of 1882, and continued to plant and protect timber thereon, in conformity with law, until October of 1899,—a period of seven years. By continuing his work for but one year more, he would have been entitled to patent. He was entitled to the privilege of doing so. He did not voluntarily abandon his work. The Land Department, by an erroneous interpretation of section 452, R. S. U. S., deprived him of his privilege and granted the land to a third party. Assuredly, Prosser has rights which a court of equity is bound to recognize and protect and, being prior in time, they are entitled to preferment over the defendant's legal title, which defendant acquired with knowledge of Prosser's equity.

The court should not be misled by authorities which deal with the status of pre-emption claimants. Such settlers, without the formalities of entry, locate on lands owned by the government, which have not been offered for sale, and which the government has not undertaken to convey to persons who fulfill certain conditions with respect to occupation and cultivation. The pre-emption settler acquired only a preferential right to buy the land occupied by him, in the event of

the government's electing to dispose of it under the general laws. He has no title and not even an option, for the Congress is at liberty to grant the land to another (*Frisbie v. Whitney, 9 Wall., 187; The Yosemite Valley Case, 15 Wall., 77*).

JAMES H. HAYDEN,
ROBERT C. HAYDEN,
JAMES B. REAVIS,
Of Counsel for Plaintiff in Error.